Oct. 8 pp 14-25 G
H 2-8 M.&H.
Oct. 11 pp. 25 G — 35 E
M&H p. 9 — 16
Oct. 13 Sul. 35 E - p 41
M&H. 25, 26, 27, 29, 30 cases.
Oct 15 { Sull. p 42 — 50
M.&H cc, 31, 35, 36, 38, 39, 44, 48.
Oct. 18 { Sull. pp 51 — 59
M&H 129 — 133 cases.
Oct. 20 { Sull pp 60 - 70
M&H 86, 87, 88, 89, 99, 101
Oct. 22 { Sull. pp 72 - 81
M.&H. cc. 104, 106, 110, 114, 120.
Oct. 25 { Sull 82 — 89
M&H 62, 65, 66, 68, 81, 82
Oct. 27 { Sull pp 90 — 100 par. 191
M&H 155 + 156, 160, 167
Oct. 29 { Sull 100 — 110 par. 214
No M&H.
Nov. 1 { Sull. 110 — 123
Nov. 3 { Sull 127 - 134
M&H 175, 176, 182, 186
Nov. 5 { Sull. 135 — 146
Nov 8 { Sull 148 - 155
Nov 10 { 155 — 164 Sull
Nov. 15 { Sull. pp. 169 — 179 C.
M&H 473, 474, 475, 477, 478
Nov 17 { 179 C - 189
479, 481, 487, 488, 498
Mid terms
Nov. 18 { Sull. 190 — 199 D.
M&H. 714, 715, 717
Nov. 22 { Sull 199 D - 210
M&H. 722, 727, 728, 733
Nov. 24 { Sull to p 221 —

Dec. 1 { Full 233 – 244
M & H 815, 818, 822

Dec. 3 { Full 246 – 256D
M & H 826, 829, 835

Dec. 5 { Full 255 – 263
M & H 836, 842, 850

Dec 8 { Full 267 – 279 B
M & H 436 – 437

Dec 10 { Full 279 B – 289 E
M & H 438, 439, 443

Dec. 13 { Full 289 – 296

Dec. 15 { Full 298 – 311
M & H 296, 298, 303

an. 3 { Full 312 – 322
M & H 304, 306, 307, 310 – After vac. !

an. 5 { Full 323 – 333

an. 7. Full . 333 – 344

em. 10 { Full 345 – 358
M & H 589, 590, 593, 594

n. 12 { Full 359 – 368
M & H 595, 596, 599, 600

n. 14 { Full 369 – 380
M & H 664, 665, 672

n 16 { Full 382 – 389
M & H 667, 669, 670

an 19 { Full 393 – 404

an. 21 { Full 405 – 413

an. 24 { Finish Book!

Numbering Exam

Thurs. Jan. 2

AMERICAN BUSINESS LAW

AMERICAN BUSINESS LAW

WITH LEGAL FORMS

BY

JOHN J. SULLIVAN, A.M., LL.B., LL.D.

PROFESSOR OF LAW AT THE UNIVERSITY OF PENNSYLVANIA AND MEMBER OF THE PHILADELPHIA BAR

FOURTH EDITION

NEW YORK AND LONDON
D. APPLETON & COMPANY
1927

COPYRIGHT, 1909, 1912, 1920, 1927, BY
D. APPLETON AND COMPANY

Printed in the United States of America

TO

FRANCIS H. SHIELDS

OF THE PHILADELPHIA BAR

WHO HAS BEEN OF CONSTANT AID

IN THE PREPARATION OF

THIS BOOK

PREFACE

One of the most noteworthy developments during recent years in educational courses has been the increasing prominence given to the study of business law. A few years ago this subject was taught virtually nowhere save in law schools. To-day it is being generally taken up by progressive colleges and universities. It is a study whose educational value can hardly be overestimated. It trains and exercises the student's mind, and it is of such practical utility that he cannot fail to realize its advantages. Moreover, it has a rare human interest, especially if the principles are illustrated with actual cases. Almost every case in the higher courts represents a conflict on the outcome of which important interests are staked. And the decision of each lawsuit not only shows the result of that particular case, but also indicates what will probably be decided in similar cases arising thereafter.

In the following pages the attempt is made to provide a text-book for students taking a course in business law, and to answer such practical legal questions as are likely to perplex the business man. While the desire to make the work useful to business men has been kept steadily in view, this has not prevented, but has rather necessitated, the unfolding of the subject in the orderly manner which is essential in school books. There are so many rules of law that the study of them is hopelessly confusing unless they are arranged systematically. The following table of contents shows in outline the plan of treatment pursued

throughout the volume, and it should be frequently consulted by the reader.

The choice of topics and the method of treating them have been largely guided by the writer's experience with many classes of students, both those who had already entered the ranks of business and those younger men who were looking forward to a business career. Attention has been given to the character of the business law courses offered in the leading institutions of learning throughout the country, and it may be hoped that this work will commend itself as a text-book. To make it more valuable for use in the classroom, a set of questions has been appended to each chapter.

The five books into which the volume is divided are arranged in a natural order. The first book concerns contracts in general. This is the most important subject in business law. The second book begins by showing how contracts may be formed through agents who represent the parties in interest. The chapters on agency explain also the relations of agents and their employers toward each other and toward third parties. In the succeeding chapters on partnership, we are introduced to a more complicated situation, for each member of a partnership is usually its agent and at the same time one of the proprietors. Then we consider certain kinds of limited partnerships which approach in their legal features the character of a corporation. Book second concludes with a number of chapters about corporations. Book third deals with property rights and certain contracts specially concerning property. Sales and leases of real estate are considered, as well as similar transactions affecting personal property. In the fourth book contracts of suretyship and guaranty and various kinds of insurance contracts are treated. In the fifth book the subject of decedents' estates is taken up, together with the intestate law, wills, and es-

tates in trust. A number of forms for the guidance of business men are introduced in appropriate places.

The matters herein discussed are worthy of everyone's study. A knowledge of the law is no longer regarded as the property of lawyers alone. All are bound at their peril to know it so far as it applies to themselves and their affairs. Ignorance of it is no excuse. But apart from the utility of this subject, it must always appeal to the student as a wonderful monument of learning. It is a well worked out science combining the exactness of logic with such flexibility that it can be adapted to meet the ever-changing needs of an American commonwealth. The reader should try to get not merely an understanding of the legal rules, but also an appreciation of their justice, wisdom, and harmony. He should realize that they have been shaped under the pressure of economic, social, and political conditions, and that nearly all of them represent the experience of many generations.

Business law in the United States is largely derived from the common law of England, and it should in almost every respect be uniform from Maine to California. While there are certain points of difference in the statutes and decisions of the several states, such differences are diminishing rather than increasing. This tendency favors the interests of commerce which is to some extent hampered by local diversities in the law. The commissioners appointed from nearly all the states to harmonize business law throughout the Union have already done much good work and are still continuing it. The latest results of their efforts are, it is believed, reflected in this volume.

In preparing the fourth edition many changes have been made to bring the work down to date.

JOHN J. SULLIVAN.

LAND TITLE BUILDING, PHILADELPHIA.

CONTENTS

CHAP. PAGE

I.—The Law in General 1–5

BOOK FIRST

CONTRACTS

PART I.—THE FORMATION OF CONTRACTS

II.—What a Contract Is and How It Will be Studied . 9–13

(A) The definition of a contract, 9. (B) Contractual rights and obligations, 11. (C) How the subject of contract law will be studied, 12.

III.—The First Element Necessary in All Contracts, Offer and Acceptance 14–30

(A) Introductory, 14. (B) The parties must seriously intend to enter into an agreement, 15. (C) The offer and the acceptance must be definite, 18. (D) A party entering into a contract may be bound by terms of which he is unaware, if the other party has duly embodied such terms in the contract, or if they are implied by recognized custom, 20. (E) The offer or acceptance or both may be made either by words or by conduct, 21. (F) There must be more than an intention to make an offer or to accept it: there must be some communication of the offeror's intention to the offeree, and of the offeree's intention to the offeror, 23. (G) An offer may be withdrawn at any time before acceptance, even though the offeror has promised to hold it open longer, 25. (H) If an offeror specifies how long his offer will remain open, it may be accepted within the time set, unless previously revoked. If no time is specified, the offer, if not accepted within a reasonable time, lapses and cannot be ac-

CHAP. PAGE

cepted thereafter, 26. (I) An offer lapses, if the offeree rejects it or makes a counter proposition, 27. (J) After acceptance, neither party may withdraw, or change any of the terms of the contract, without the other's consent, 27.

IV.—The Second Element Necessary in all Contracts, Seal or Consideration 31–41

(A) Introductory, 31. (B) In what states a seal has the same binding force as consideration, 33. (C) In certain cases consideration is needed, even in those states where a seal ordinarily suffices to make a promise binding, 33. (D) Consideration may consist of either a benefit to the promisor or a detriment to the promisee, 34. (E) The mere fact that a consideration is of slight value does not destroy its legal efficacy, 35. (F) The doing of what one is already legally bound to do is no consideration, 37. (G) A promise by one party is sufficient consideration for a promise by the other party, 38. (H) Consideration may be present or future, but a past consideration is not sufficient to support a promise except in certain special cases, 40. (I) An agreement which has been fulfilled cannot be set aside merely because it lacks both seal and consideration, 40.

V.—The Third Element Necessary in all Contracts, Capacity of Parties 42–50

(A) Introductory, 42. (B) Contractual powers of minors, 43. (C) Contractual powers of persons mentally deficient, 47. (D) Contractual powers of married women, 48. (E) Contractual powers of foreigners, 49. (F) Contractual powers of corporations, 50.

VI.—The Fourth Element Necessary in all Contracts, Reality of Consent 51–59

(A) Mistake, 51. (B) Misrepresentation, 53. (C) Fraud, 55. (D) Undue influence, 56. (E) Force, 58.

VII.—The Fifth Element Necessary in all Contracts, Legality 60–71

(A) Agreements violating constitutional or statute law or federal treaties, 61. (B) Agreements interfering with the public government, 64. (C) Agreements injurious to the people at large or to particular individuals, 66.

CHAP. PAGE

VIII.—The Sixth Element Necessary in some Contracts, Special Formality . . . 72–78

(A) Sales of real estate, and certain other realty contracts, 72. (B) Certain sales of personal property, 73. (C) Contracts to be performed more than a year after they are made, 74. (D) Contracts of suretyship and guaranty, 75. (E) Certain miscellaneous contracts, 77.

PART II.—THE OPERATION OF CONTRACTS

IX.—A Contract When Formed Usually Affects the Obligations and Rights of Nobody but Those Who are Parties to It 79–81

X.—After the Formation of a Contract, Rights and Obligations Created by It May Sometimes be Passed to Outsiders by Subsequent Agreement or by Operation of Law . . 82–89

(A) Transfer by subsequent agreement, 82. (B) Transfer by operation of law, 86.

XI.—Negotiable Contracts 90–126

(A) The transfer of non-negotiable contractual rights, 90; (B) The transfer of negotiable contractual rights, 92. (C) Promissory notes and bills of exchange; in general, 93. (D) Requirements of promissory notes and bills of exchange, 96. (E) Negotiation of promissory notes and bills of exchange, 101. (F) Liabilities of parties to promissory notes and bills of exchange, 106. (G) Presentment for payment of promissory notes and bills of exchange, 109. (H) Notice of the dishonor of promissory notes and bills of exchange, 113. (I) Acceptance and protest of bills of exchange, 117. (J) Certain documents besides promissory notes and bills of exchange are negotiable, 119.

PART III.—THE PROOF AND THE INTERPRETATION OF CONTRACTS

XII.—Rules of Evidence Relating to Contracts 127–131

XIII.—Rules for the Interpretation of Contracts 132–134

PART IV.—THE DISCHARGE OF CONTRACTS

CHAP. PAGE

XIV.—Discharge of Contracts by Agreement . 135–137

XV.—Discharge of Contracts by Performance 138–139

XVI.—Discharge of Contracts by Breach . . 140–147

XVII.—Discharge of Contracts by Impossibility 148–149

XVIII.—Discharge of Contracts by Bankruptcy . 150–165

(A) Who may become bankrupts, 151. (B) How to force one into bankruptcy, 152. (C) Bankrupt partnerships, 153. (D) Exemptions and duties of bankrupts, 154. (E) Compositions: the discharge of bankrupts, 155. (F) Offenses against the bankruptcy statute, 158. (G) Management of bankrupt estates, 158. (H) Creditors and their claims, 161. (I) State insolvency laws, 163.

BOOK SECOND

AGENCY, PARTNERSHIPS AND CORPORATIONS

PART I.—AGENCY

XIX.—The Formation of Agency 169–174

(A) Agency created by express grant, 170. (B) Agency implied from conduct or relationship, 170. (C) Agency presumed through estoppel, 172. (D) Agency created by ratification, 173.

XX.—The Rights and Obligations of Principals, Agents and Third Parties . . . 175–185

(A) The agent's obligations toward his principal, 175. (B) The agent's obligations toward third parties, 178. (C) The principal's obligations toward his agent, 179. (D) The principal's obligations toward third parties, 181. (E) The obligations of third parties toward the principal, 182. (F) The obligations of third parties toward the agent, 183.

XXI.—The Termination of Agency . . . 186–189

(A) Termination of agency by agreement, 186. (B) Termination of agency by performance, 186. (C) Termination of agency by breach, 186. (D) Termination of agency by

CHAP. PAGE

impossibility, 188. (E) Termination of agency by bankruptcy, 188.

PART II.—PARTNERSHIPS

XXII.—The Formation of Partnerships . . 190–194

XXIII.—The Rights and Obligations of Partners 195–202

(A) The relation of a partner toward his fellows as a coproprietor of the firm, 195. (B) The authority of a partner as an agent of the firm, 197. (C) A partner's duty of loyalty to his firm, 198. (D) Partnership accounts, 199. (E) A partner's obligations to firm creditors, 200.

XXIV.—The Termination of Partnerships . . 203–207

(A) Termination of partnerships by agreement, 203. (B) Termination of partnerships by performance, 204. (C) Termination of partnerships by breach, 204. (D) Termination of partnerships by impossibility, 205. (E) Termination of partnerships by bankruptcy or insolvency, 206.

XXV.—Partnerships Formed Under Special Statutes 208–210

(A) Limited partnerships, 208. (B) Joint stock companies, 209.

PART III.—CORPORATIONS

XXVI.—Formation and Powers of Corporations . 211–221

(A) The charter, 211. (B) The by-laws, 213. (C) Powers of corporations, 217. (D) Ultra vires acts, 218. (E) Promoters and contracts made by them, 219.

XXVII.—Admission to Membership in a Corporation, Expulsion Therefrom and Transfer of Interest Therein 222–228

(A) Membership in corporations not for profit, 222. (B) Membership in corporations for profit, 223. (C) Fraudulent issue of stock by the officers of a corporation, 227.

XXVIII.—The Right of Stockholders and Other Members of Corporations to a Share of Profits 229–232

(A) A stockholder's right to dividends, 229. (B) The rights of preferred stockholders, 230. (C) The right to a

CHAP. PAGE

dividend as between various claimants, 231. (D) A stockholder's right to subscribe for new stock, 231.

XXIX.—The Rights of Stockholders and Other Members of Corporations to Control and Inspect Corporate Affairs . . 233–237

(A) The right of a member to vote at corporate meetings, 233. (B) The manner of conducting meetings of corporate members, 235. (C) The business transacted at meetings of corporate members, 236. (D) The right of a member to inspect the company's books and to interfere in the management of its affairs, 236.

XXX.—The Liabilities of Stockholders . . 238–240

(A) Liability on stock subscriptions, 238. (B) Liability of original subscribers and other stockholders to pay assessments, 239. (C) Liability of stockholders for certain corporate debts, 239.

XXXI.—The Directors 241–245

(A) The qualifications of directors, 241. (B) The powers of directors, 241. (C) The compensation of directors, 243. (D) The obligations and liabilities of directors, 244.

XXXII.—The President and the Other Officers 246–247

(A) The president, 246. (B) The secretary, 247. (C) The treasurer, 247.

XXXIII.—The Consolidation and Merger of Corporations 248–250

XXXIV.—Charter Fees and Taxes; Regulation of Domestic and Foreign Corporations . . 251–254

(A) Charter fees and taxes, 251. (B) Reports required of corporations, 252. (C) Registration by foreign corporations, 252.

XXXV.—Public and Semipublic Corporations . . 255–259

(A) Quasi corporations, 255. (B) Municipal and other public corporations, 256. (C) Semipublic corporations, 258

CHAP. PAGE

XXXVI.—The Termination of Corporations . . 260–263

(A) Termination of corporations by agreement, 260. (B) Termination of corporations by performance, 261. (C) Termination of corporations by breach, 261. (D) Termination of corporations by impossibility, 262. (E) Termination of corporations by bankruptcy or insolvency, 262.

BOOK THIRD

PERSONAL AND REAL PROPERTY

XXXVII.—The Various Kinds of Property and the Acquisition and Transfer Thereof 267–272

(A) Original acquisition of property, 267. (B) Transfer of property, 269.

PART I.—BAILMENTS, INCLUDING CONTRACTS FOR PLEDGING, HIRING AND TRANSPORTING PERSONAL PROPERTY

XXXVIII.—The Definition of a Bailment, and the Various Kinds Thereof . . . 273–275

XXXIX.—The Rights and Obligations of Bailors, Bailees and Third Parties . . 276–283

(A) The bailee's obligations toward the bailor, 276. (B) The bailee's obligations toward third parties, 279. (C) The bailor's obligations toward the bailee, 279. (D) The bailor's obligations toward third parties, 281. (E) Obligations of third parties toward the bailor, 281. (F) Obligations of third parties toward the bailee, 282.

XL.—The Transportation of Personal Property 284–297

(A) Who is a common carrier? 284. (B) Duty to receive and carry, 285. (C) Delivery to carrier, 286. (D) Bills of lading, 288. (E) Duty to carry safely; discrimination, 289. (F) Custody and control of the goods, and rights in them, 290. (G) Termination of liability; delivery by carrier, 292. (H) Baggage, 295.

PART II.—SALES AND MORTGAGES OF PERSONAL PROPERTY

CHAP. PAGE

XLI.—The Definition of a Sale, and the Distinction Between Sales and Bailments . . 298–301

(A) The formation of a contract of sale, 299. (B) Sales and bailments distinguished, 301.

XLII.—The Transfer of Title from Seller to Buyer 302–305

(A) When the title passes to the buyer, 302. (B) What title passes to the buyer, 304.

XLIII.—The Rights of the Seller of Personal Property 306–311

(A) The seller's right to set the contract aside if the buyer has committed fraud, 306. (B) The seller's lien to secure payment of the purchase money, 309. (C) The seller's right of stoppage in transit, 310.

XLIV.—The Rights of the Buyer of Personal Property 312–317

(A) The buyer's right to get goods of a certain kind and quality, 312. (B) Warranty of the seller's title, 316.

XLV.—Chattel Mortgages 318–322

PART III.—LEASES OF REAL PROPERTY

XLVI.—The Formation of the Relation of Landlord and Tenant 323–327

(A) Contracts of lease implied from the conduct of the parties, 323. (B) Leases by word of mouth, 324. (C) Written or printed leases, 324. (D) Precautions to be observed by the tenant, 326.

XLVII.—The Landlord's Rights 328–330

(A) The right to distrain, 328. (B) Where the tenant holds over, 329. (C) The tenant's duty of loyalty, 329.

XLVIII.—The Tenant's Rights 331–333

(A) The condition of the premises, 331. (B) The right to peaceful occupancy, 332. (C) As regards repairs, 332. (D) To remove fixtures and other improvements, 333.

PART IV.—SALES AND MORTGAGES OF REAL PROPERTY

CHAP. PAGE

XLIX.—Contracts to Sell and Conveyances of Realty 334–338

(A) The formation of a contract to sell realty, 334. (B) The performance of a contract to sell realty by executing and delivering the deed and making settlement, 335. (C) The necessity of recording, 337.

L.—Rights and Obligations of the Parties to a Sale of Realty after Title has Passed . 339–344

(A) Obligations of the seller toward the buyer, 339. (B) Obligations of the buyer toward the seller, 344.

LI.—Mortgages of Realty 345–349

(A) Obligations of the mortgagor toward the mortgagee, 345. (B) Obligations of the mortgagee toward the mortgagor, 346.

BOOK FOURTH

SURETYSHIP AND GUARANTY AND INSURANCE

PART I.—SURETYSHIP AND GUARANTY

LII.—The Nature and the Formation of Suretyship and Guaranty Contracts 353-358

(A) Nature of the contract, 353. (B) Formation of the contract, 355.

LIII.—Rights and Obligations of the Parties . 359–365

(A) Duties of the obligee toward the surety or the guarantor, 359. (B) Duties of the surety or the guarantor toward the obligee, 363. (C) Duties of the principal obligor toward the surety or the guarantor, 364.

LIV.—The Termination of the Contract . . 366–368

(A) Discharge by agreement, 366. (B) Discharge by performance, 366. (C) Discharge by breach, 367. (D) Discharge by impossibility, 367. (E) Discharge by bankruptcy, 368.

PART II.—INSURANCE

CHAP. PAGE

LV.—Fire Insurance 369–381

(A) Who has an insurable interest? 369. (B) Formation of the contract, 371. (C) Conduct of the insured after the policy is issued, 374. (D) What risks are insured against? 377. (E) The transfer of the policy, 378. (F) Notice and proof of loss, 379.

LVI.—Life Insurance 382–389

(A) Who has an insurable interest? 382. (B) Formation of the contract, 384. (C) Beneficiaries, 386. (D) Suicide; execution for crime, 387. (E) Notice and proof of death, 388

BOOK FIFTH

THE ESTATES OF DECEDENTS

PART I.—THE MANAGEMENT OF DECEDENTS' ESTATES

LVII.—The Granting of Authority to Administrators and Executors, and the Revocation Thereof 393–398

(A) Proving the will, 393. (B) Qualifications of executors and administrators, 394. (C) Various kinds of executors and administrators, 395. (D) Bonds of executors and administrators, 397. (E) Revocation of the authority of executors and administrators, 397.

LVIII.—The Duties of Executors and Administrators after They have Qualified . . . 399–404

(A) The first step: to bury the decedent, 399. (B) The second step: to give public notice of one's appointment, 400. (C) The third step: to file an inventory and appraisal, 400; (D) the fourth step: to collect what belongs to the estate, 400. (E) The fifth step: to pay the costs of administering the estate and the decedent's debts, 401. (F) The sixth step: to pay the succession taxes and other taxes in proper cases, 403.

CHAP. PAGE

LIX.—The Accounts of Executors and Administrators, and the Final Steps in Closing an Estate 405–409

(A) The seventh step: to file an account, 405. (B) The eighth step: to have one's account settled, 408. (C) The ninth step: to distribute the balance in one's hands among the persons entitled thereto, 408.

PART II.—THE INTESTATE LAW, WILLS AND TRUST ESTATES

LX.—The Intestate Law 410–413

(A) The rights of the widow, 411. (B) The rights of the widower, 411. (C) Children and other descendants, 412. (D) The father and mother, 412. (E) Brothers and sisters and their descendants, 412. (F) Other relatives, 412.

LXI.—Wills 414–419

(A) Who may make a will, 414. (B) Various kinds of wills, 414. (C) Formal requisites, 415. (D) A form of will, 416. (E) Codicils, 416. (F) Revocation of wills, 416.

LXII.—Estates in Trust 420–424

(A) The various kinds of trusts, 420. (B) A trustee's powers, duties and liabilities, 422.

INDEX 425–433

AMERICAN BUSINESS LAW

CHAPTER I

THE LAW IN GENERAL

1. The words "business law" mean the rules established and sanctioned by public authority to govern the transaction of business. These rules are drawn from many sources. Most of them are founded on the customs of business men, whose time-honored methods of transacting their affairs have, in many instances, ripened into law.

2. The definite establishment of a legal rule may be brought about by its being embodied in (*a*) the Constitution of the United States or of a state, (*b*) the statutes passed by the legislature of the United States or of a state, (*c*) the local ordinances made by the authorities of a city, town, township, borough, district, or other territorial subdivision of a state, or (*d*) the decisions of a court.

3. The Constitution of the United States is the fundamental law of the nation. It is mainly a political document, and contains only a few rules relating to business law. It was adopted by the people of the United States, and can be amended as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes,

as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

4. The United States Constitution provides for a national legislature. This legislature meets at Washington and passes statutes concerning affairs under the control of the Federal Government. " The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Hence the acts of Congress do not supply a large part of the matter which is treated in this work, and we must look chiefly at the laws of the several states.

5. Each state of the Union is a distinct sovereignty, and supreme within its own territory save in so far as a portion of its powers has been ceded by the United States Constitution to the Federal Government. Each state has its own constitution, which, subject to the United States Constitution, statutes, and treaties, is its paramount law.

6. The constitution of each state lays down only a few principles of business law, leaving to the state legislators and judges the work of building up a legal system which will regulate in detail the transaction of business affairs. Each state has its own governor and other executive officers, its own legislature, and its own courts.

7. If a statute of the national Congress is contrary to the United States Constitution, it is void, for it violates the highest law. Likewise, if a statute passed by a state legislature is contrary either to the constitution of that particular state or to the United States Constitution, it is void. The courts decide whether or not a statute is unconstitutional. The United States Supreme Court is the final arbiter as to the violation of the United States Constitution by an act of Congress or by an act of a state legislature. The supreme court of a state is the final arbi-

ter as to the violation of the constitution of that particular state by an act passed by its legislature. If a statute is constitutional the courts are bound to enforce it.

8. The legislatures of some states have left to the courts the development of a system of business law, and have interposed in only a few matters requiring drastic changes in the existing law. In other states the legislatures have passed lengthy statutes covering vast portions of the field of law. Such lengthy statutes are called codes. In California, Connecticut, Louisiana, Massachusetts, Montana, New York, North Dakota, and many other states much of the law has been codified.

9. In all the states, even in those which have adopted codes, the law is for the most part judge-made law. For centuries the courts of the English-speaking world have been laying down and formulating legal rules. Such rules as work well are widely adopted, and gradually a logical and harmonious legal system is evolved. When the law of a state is codified, it largely embodies these rules which have stood the test of long experience.

10. The courts of each state may be divided into two classes: first, the lower courts, wherein most suits are begun; second, the higher courts, whose main function is to hear appeals from the lower courts. Most of the lower courts have jurisdiction only over a county or other certain part of a state. Most of the higher courts have jurisdiction over an entire state. The highest court of each state helps to keep the law of that state uniform, for when it has once laid down a certain legal rule it seldom changes, and the lower courts of the same state are bound to follow it when the question arises again, unless meanwhile the legislature has amended the law.

11. In addition to the state courts, there is a system of United States courts covering the country. These courts have a limited jurisdiction, and are mainly occupied with

matters arising under the acts of Congress. There is at least one United States District Court in each state. There are also nine United States Circuit Courts of Appeals, each of these courts having jurisdiction throughout three or more states. These Circuit Courts of Appeals hear many appeals from the United States District Courts. The court of last resort in the Federal judiciary system is the United States Supreme Court. This court is composed of nine justices. Its sessions are held at Washington, D. C. The United States has also established a Court of Claims to consider certain claims against the Government. Moreover, United States courts have been established in the District of Columbia, the territories and the insular possessions of this nation.

12. There are many differences in the laws of the several states. Some of these differences are due to local conditions. Some are traceable to the colonization of the respective states by different European nations. The thirteen original states, as well as most of the others, draw much of their law from England. The law of Louisiana is partly derived from French sources. The laws of Florida, New Mexico, and California show traces of Spanish influence. The law governing commercial transactions is in most matters nearly uniform throughout the country. In commercial law there is special need of uniformity, because this facilitates the doing of business between the states.

13. Some courts handle only civil cases, wherein one party, called the plaintiff, is seeking to recover certain property or a sum of money from another party, called the defendant. Some courts handle only criminal cases wherein the Government of the United States or of a state seeks

to have the defendant fined or imprisoned. Some courts take up both civil and criminal matters. Most criminal proceedings, although brought in the name of the Government, are set on foot by private individuals who are specially wronged by the crimes which have been committed. The civil courts also supervise the distribution of the estates of deceased persons and of persons mentally deficient, as well as of trust estates and estates of persons, corporations, and other associations which have made an assignment or gone into bankruptcy.

14. In some states, certain civil courts, called equity or chancery courts, exercise extraordinary powers, as by granting injunctions and amending defective deeds or other documents. In many states, on the other hand, there are no separate equity courts, but the ordinary civil courts, in proper cases, exercise the extraordinary powers formerly belonging only to courts of equity.

QUESTIONS

1. How are legal rules established?
2. How was the United States Constitution adopted, and how can it be amended?
3. What is the position of each state of the Union in relation to the United States?
4. When is a statute unconstitutional?
5. How has business law developed in the various states?
6. How may the state courts be classified?
7. What are the various United States courts?
8. What matters are under the jurisdiction of the civil courts?
9. What matters are under the jurisdiction of the criminal courts?

BOOK FIRST

CONTRACTS

THE FORMATION OF CONTRACTS

CHAPTER II

WHAT A CONTRACT IS AND HOW IT WILL BE STUDIED

(A) The definition of a contract

15. A contract is an agreement enforceable at law made between two or more persons, whereby rights are acquired by one or more to acts or forbearances on the part of the other or others.

16. The words "enforceable at law" in the foregoing definition, show that an agreement is not a contract, unless it is of a kind which the law may be invoked to enforce. Chapters III to VIII treat of the ingredients required to make a legally enforceable agreement.

17. The words "made between two or more persons" in the foregoing definition, show that two or any greater number of persons may be parties to a contract. At least two persons are required to make a contract, for one cannot contract with himself.

GORHAM'S ADMINISTRATOR *v.* MEACHAM'S ADMINISTRATOR, 63 Vt. 231 (1891). Meacham was Gorham's administrator. Becoming indebted to the estate, he executed a note and a mortgage payable to himself as administrator. After Meacham's death a new administrator of Gorham's estate was appointed, and sued to

foreclose the mortgage. *Held* that the mortgage was void, because Meacham was the only party to it.

18. The words "whereby rights are acquired by one or more to acts or forbearances on the part of the other or others" mean that a contract confers rights on at least one of the parties as against the other party or parties whom it binds to fulfill their respective obligations. If a contract binds only one party to some act or forbearance, it is called unilateral. If it binds two parties reciprocally, it is called bilateral.

GARDEN *v.* DERRICKSON, 2 Del. Ch. 386 (1868). Isabella Garden gave her son Francis her bond for $7,100. Francis died and his executrix sued to enforce the bond. *Held* that she could do so; even though the contract did not require Francis to do anything. This was a unilateral contract. The seal on the bond gave it validity. As to seals, see Section 58.

BARRY *v.* CAPEN, 151 Mass. 99 (1890). Capen asked Barry, a lawyer, to represent him in a certain case, promising to pay him $1,000. Barry assented. *Held* this was a bilateral contract. Barry was bound to render legal services to Capen. Capen was bound to pay $1,000 to Barry for these services.

19. The word "acts" in the foregoing definition, covers not merely the doing of various kinds of work, but also the payment of money, and, in general, the performance of any positive duty imposed by contract. The word "forbearances" covers the refraining from the doing of anything, and, in general, the performance of any negative duty imposed by contract.

LESLIE *v.* CONWAY, 59 Cal. 442 (1881). Conway owed money to Leslie; and Varelas, an employee of Conway, was also in Leslie's debt. Conway agreed to forward a certain sum to Leslie in payment of both his own and Varelas's debts by September 18, 1880, and Leslie, in return for Conway's assuming liability for Varelas's debt, agreed to wait till that time for his money. Leslie broke his contract and sued Conway before September 18, 1880. *Held*

that he was bound to forbear as agreed. He had given Conway a right to insist that he should refrain from suing until the time named.

(B) Contractual rights and obligations

20. An obligation is the opposite of a right. A right which a contract confers on one party is matched by the obligation to satisfy that right which it casts on one or more of the other parties.

WORRELL *v.* FIRST PRESBYTERIAN CHURCH, 23 N. J. Eq. 96 (1872). For many years during which Worrell was pastor of the church his salary had been only partially paid. In 1867, it was decided to settle matters between him and the church, and finally an agreement was reached whereby he was to resign from the pastorate and the church was to allow him a credit of $2,000 on the mortgage which it held against his home. *Held* that this contract gave the church a right to require Worrell to resign, and, conversely, obligated Worrell to resign. It gave Worrell a right to $2,000 credit on his mortgage indebtedness, and, conversely, obligated the church to allow such credit.

21. A right of property in an article or in land must be distinguished from a right created by contract which enables one party to force another to do, or forbear from doing, something. The former is a right to a thing. The latter is a right against a person.

22. The word "contract" comes from the Latin verb, "*contrahere,*" which means "to draw together." This indicates that when persons form a contract, they bind themselves together, each becoming personally responsible for the fulfillment of his part of the agreement. If a contractual promise is broken, the party to whom it was given (called the promisee) has a personal hold upon the one who made it (called the promisor). The promisee has a right to set the machinery of justice in motion to force the promisor (so far as compulsory legal measures are prac-

ticable) to pay damages for his breach of contract. And in certain exceptional cases the disappointed promisee may also have an injunction issued to compel specific performance by the promisor. The promisor was free (before he entered into the contract) to refuse to make it, but having bound himself he must abide by his agreement or pay damages for breaking it. After a contract has been made, an obligation to perform each contractual promise rests on the party giving that particular promise until he completes what he has agreed to do, unless the obligation is discharged in some other way.

(C) How the subject of contract law will be studied

23. In this volume there are five books. The first book, relating to contract law, is divided into four parts.

Part I deals with the making of a contract, explaining the various elements required to form a binding agreement. See Chapters III to VIII.

Part II discusses the scope of contractual rights and obligations, showing what persons may exercise the rights and what persons are subject to the obligations. See Chapters IX to XI.

Part III sets forth some important rules governing the proof of a contract in legal proceedings and the proper method of interpreting an obscure contract. See Chapters XII to XIII.

Part IV treats of the various ways of discharging obligations created by a contract. The discharge of such obligations necessarily satisfies the rights arising under the contract, which is thereby brought to an end. See Chapters XIV to XVIII.

24. Part I is discussed under six subdivisions, which correspond to the elements going to make up various con-

tracts. Five of these elements, which are necessary for the making of any contract, are treated one by one in Chapters III to VII. These elements are: first, offer and acceptance; second, seal or consideration; third, capacity of parties; fourth, reality of consent; fifth, legality. A sixth element, special formality, is required in a few contracts, and Chapter VIII treats of this matter.

QUESTIONS

1. What is a contract?
2. How many persons are required to make a contract?
3. What is meant by the words "enforceable at law"?
4. What is an unilateral contract; a bilateral contract?
5. What does the word "acts" in the definition of a contract include?
6. What does the word "forbearances" include?
7. What is an obligation?
8. What is the relation of an obligation to a right?
9. What is the distinction between a property right and a contract right?
10. From what is the word "contract" derived?
11. If one party breaks his contract, what right has the other against him?
12. After a contractual obligation is entered into, may it be discharged?
13. Into how many parts is the book on contract law divided?
14. With what does Part I deal, and how is it subdivided?
15. What are the elements required in all contracts?
16. What additional element is required in a few contracts?
17. With what do Parts II, III, and IV deal, respectively?

CHAPTER III

THE FIRST ELEMENT NECESSARY IN ALL CONTRACTS, OFFER AND ACCEPTANCE

(A) Introductory

25. An offer is a proposition to enter into a contract. An acceptance is the due manifestation by the party to whom the offer is made of his assent to its terms.

26. Offer and acceptance are necessary to form a contract, as appears from the definition of contract given at the beginning of Chapter II. For a contract is an agreement, and the way in which the parties reach an agreement is by one's making an offer and the other's accepting that offer. In some cases it is necessary to analyze carefully the communications between the parties, in order to discover whether or not there have been an offer and an acceptance. There may be long negotiations, and a variety of terms may be proposed, but as soon as one party duly accepts the other's offer (and not till then) a contract arises.

EXCEPTION. If two persons are debating the terms of a proposed contract, but are unable to agree, and a bystander suggests a happy compromise, to which they both simultaneously assent, a contract is formed. Here, neither party has made an offer which is the foundation of the contract, for neither has advanced a proposition which the other has accepted.

27. One who makes an offer is called the offeror. One to whom an offer is made is called the offeree. If the offeree, instead of accepting an offer, makes a different

offer of his own, he is an offeror as regards this second offer, and the party who was the original offeror becomes an offeree. The two parties may thus continue negotiating indefinitely, for a contract is not formed until an offeree accepts an offer which has been made to him.

28. At the moment when the offeror and the offeree come together on the same terms, the first element, offer and acceptance, is supplied, and the contract is formed, provided the other necessary elements are present.

29. Where parties are dealing together face to face and come to an agreement promptly, it is easy to understand how the offer and acceptance are made. On the contrary, where parties are at a distance from each other, and where their negotiations are long drawn out, it may be hard to decide whether or not their minds have met on a given proposition. The following rules are useful in helping to clear up many doubtful cases.

(B) The parties must seriously intend to enter into an agreement

30. A jesting agreement is not binding if the parties go through the form of making a contract without intending it to stand. The essence of an agreement is the meeting of the minds. The mere use of words indicating a contract means nothing, if it appears that nobody meant them to be binding.

McClurg *v.* Terry, 21 N. J. Eq. 225 (1870). McClurg had returned to Jersey City from an outing with Terry and a number of young friends, among whom was a justice of the peace. McClurg jestingly challenged Terry to marry her and he accepted the challenge in the same spirit. The justice performed the ceremony. The parties never lived together as husband and wife. McClurg sued to have the ceremony annulled. *Held* that as the affair was a mere joke, there was no marriage.

31. It is sometimes dangerous to make a jesting agreement. Perhaps one of the parties may take it seriously, or may afterwards fraudulently pretend that he did so. In either case, if the matter goes to court, and if this party, who swears that he thought everything was in earnest, is believed, he may enforce the alleged contract, provided the joke was so well carried out that it was likely to deceive.

McKinzie *v.* Stretch, 53 Ill. App. 184 (1893). Stretch sued McKinzie for $100, which McKinzie had agreed to pay for a colt as soon as it should give certain signs of being healthy. McKinzie asserted that he had agreed to buy the colt only as a joke. However, Stretch had taken the agreement seriously, being led to do so by McKinzie. *Held* that since McKinzie's conduct had been such as to make a prudent man believe him in earnest, he must pay for the colt.

32. An offer to enter into a contract must be distinguished from a mere quotation of prices. A price list published by a business house is usually only an invitation to prospective buyers, not a legal offer to sell goods at the prices stated in the list. Therefore, if a prospective buyer should write to the people who distributed the list, saying that he will take certain articles at the list prices, his order may, as a rule, be refused He is not accepting an offer, but rather making one. Unless his order is duly accepted, there is no contract.

Moulton *v.* Kershaw, 59 Wis. 316 (1884). Kershaw wrote Moulton:

Milwaukee, September 19, 1882.

J. H. Moulton, Esq.;
La Crosse, Wis.

Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt at 85 cents per bbl. Shall be pleased to receive your order.

Yours truly,
C. J. Kershaw & Son.

Moulton at once telegraphed that he would take 2,000 barrels. Kershaw refused to make delivery. *Held* that Kershaw's letter was merely an advertisement or business circular; to call attention to the fact that good bargains in salt could be had by applying to him. It was not an offer, and hence Moulton's rejected order for 2,000 barrels of salt did not unite therewith to form a contract.

33. To prevent lawsuits from being brought by disappointed parties whose orders are rejected, it is often wise to accompany a quotation of prices with a statement that all quotations are subject to prior sale to other parties, and to change or withdrawal at any time, without notice. Some business houses, when quoting prices, state that no order for their goods shall be regarded as binding unless accepted in writing. See Section 36.

34. A person who solicits bids for the purchase of certain property or for the performance of certain work, does not usually thereby offer to accept the most favorable bid. He is not an offeror when he asks that bids be tendered to him; rather, he is merely inviting offers. As a rule, he may accept whatever bid pleases him best, or reject all the bids.

35. On the contrary, if a person states beforehand that the property will go without reserve to the highest bidder, such person may be regarded as an offeror, and the highest bidder is usually deemed to accept the offer. Likewise, if one states beforehand that one will unreservedly award the doing of specified work to the lowest bidder, the party making the lowest bid is usually considered as thereby accepting an offer, and closing a contract.

36. To avoid trouble, it is wise to invite bids under the express condition that the party receiving them may accept whichever he prefers, or reject them all. This precaution, like those suggested in Section 33, is usually needless, but may at least save misunderstanding.

(C) The offer and the acceptance must be definite

37. A contract is formed by the parties themselves. The courts may be called on to interpret an obscure contract, but if the parties have never definitely come to terms at all, there is no contract to interpret and enforce. The mere fact that the parties have been negotiating and that, expecting to reach an agreement, they have gone to expense and trouble to bring it about, is not enough to make a contract. Even though one of the negotiators has abandoned chances to do business with outside parties in the belief that the negotiations will succeed, and those with whom he is bargaining trifle with him and then drop the matter, he has no redress against them. See Section 50.

38. A vague agreement, from which the courts cannot ascertain any concrete, measurable obligation, is no contract. The law is practical. Unless a promise is capable of being interpreted so as to call for something definite and tangible, it is not contractual.

39. The acceptance must be unqualified, and identical with the terms of the offer. A so-called acceptance which does not squarely meet the offer, but instead seeks to vary the proposed terms, is not a real acceptance. It is merely a counter proposition. Likewise, if an offeree, while intimating that he will probably accept, hangs back without fully committing himself, there is no contract.

James *v.* Darby, 100 Fed. 224 (1900). James and another man offered certain land to Darby. Darby wrote that he had decided to accept their proposition, adding that the owners must supply him with an abstract of title which his conveyancer would pronounce perfect. *Held* that Darby had not accepted the offer, for, by demanding a title which should satisfy his conveyancer, he had attempted to impose a new condition on the offerors.

Thurber *v.* Smith, 25 R. I. 60 (1903). Smith held a $200 promissory note. On August 1st, 1901, he wrote Thurber, offering to dispose of the note at $20 discount from its face value, if Thurber

would arrange to purchase it within a month. On August 8th, Thurber wrote back, "I would like to accept the offer and expect to have the money for it in about two weeks." On August 21st, Smith notified Thurber that he had sold the note for its face value. On August 30th, Thurber demanded the note for $180 which he was then ready to pay. *Held* that Thurber's letter of August 8th did not absolutely accept Smith's offer, which was withdrawn on August 21st. Hence there was no contract.

40. The mere fact that the parties leave something for future ascertainment does not prevent the formation of a contract, provided they arrange a method of adjusting the unsettled point.

NORTON *v.* GALE, 95 Ill. 533 (1880). In 1872, Gale leased land to Norton for fifty years. The rent was to be $5,100 annually for the first five years. After that it was to be fixed at the beginning of each five years' period by appraisers, selected in a certain way, who were to determine the value of the land and to calculate six per cent thereof as the rent for each of the succeeding five years. In 1877 Norton refused to pay rent at the rate named by the appraisers. *Held* that he was bound to pay, for the agreement of 1872 was a valid contract.

41. The mere fact that the parties use trade words or abbreviations, which are meaningless to an outsider, does not prevent the formation of a contract. Judges recognize that business men's agreements are often hastily made and tersely expressed.

WILSON *v.* COLEMAN & RAY, 81 Ga. 297 (1888). Coleman & Ray sued Wilson for failure to deliver three carloads of Texas rust-proof oats. They offered in evidence a written contract which specified "Three C. L. R. P. oats." *Held* that it might be shown that these four initials meant "carloads of Texas rust-proof."

(D) A party entering into a contract may be bound by terms of which he is unaware, if the other party has duly embodied such terms in the contract, or if they are implied by recognized custom

42. If one party gives notice of the terms on which he will contract so conspicuously that the other party should observe it, the latter is in many cases bound even though he carelessly fails to see it. A person who receives or signs a written or printed contract without reading and understanding all its terms is, nevertheless, usually bound by it. See Chapter XII. In certain exceptional cases, where fraud or mistake is clearly proved, the courts refuse to enforce such written agreements. See Chapter VI.

MARTIN *v.* SMITH, 116 Ala. 639 (1897). In 1894, Martin owed Smith some money. Martin promised to give Smith his note, but refused to mortgage his property. Smith's agent wrote out a mortgage note and handed it to Martin, who signed without reading it. When sued on the note, Martin sought to repudiate that part of it which mortgaged his property. *Held* that as Smith's agent had not misrepresented the contents of the note, Martin was bound by it. He had only himself to blame for his failure to read it.

43. A person making a contract with another is sometimes legally presumed to assent to certain terms, even though he has no actual knowledge of them. If general custom puts certain duties on parties entering into a particular kind of contract, the courts are disposed to hold any person making such a contract liable according to the custom, although he was ignorant of it when the contract was formed.

EVERINGHAM *v.* LORD, 19 Ill. App. 565 (1886). Everingham sued Lord for the price of a carload of corn. Lord's defense was that the corn was not of the quality promised. But Lord had not complained within twenty-four hours after delivery, as required

by the custom of the Chicago Board of Trade, of which both parties were members. *Held* that although this custom had not been mentioned when the contract was made, the parties must be presumed to have dealt with reference to it. Hence, Lord's complaint as to the quality of the corn came too late.

(E) The offer or acceptance, or both, may be made either by words or by conduct

44. The essence of a contract is the meeting of the minds of the parties. Usually they may communicate with each other by letter, telegraph, telephone, personal interviews, deaf and dumb signs, or by any conduct which shows an intention to make or accept an offer. Certain exceptional contracts treated in Chapter VIII must be made formally, and cannot be implied from mere conduct.

Hobbs *v.* Massasoit Whip Co., 158 Mass. 194 (1893). Hobbs had often delivered eelskins to the Whip Company, which had accepted the skins and paid for them. In February, 1890, Hobbs delivered 2,350 skins which were kept by the Whip Company until they were worthless. Hobbs sued for the price. *Held* that while ordinarily a dealer may not send goods to a party and put him under the duty of paying for them or notifying the sender that he will not buy them, yet here the past dealings between the parties justified Hobbs in sending the skins. He knew that the Whip Company was in the market for eelskins, and when he delivered them, his conduct indicated an offer to sell them. The Whip Company, failing to notify Hobbs that it did not want the skins, impliedly accepted his offer.

McCormick Harvesting Machine Co. *v.* Markert, 107 Ia. 340 (1899). Markert ordered a machine to be delivered at Manson on or before July 1, 1897. The company did not acknowledge the order, but tendered the machine to Markert before July 1, 1897. Markert refused to take it, contending that his offer had not been duly accepted. *Held* that the filling of the order was an acceptance of Markert's offer to pay for the machine, and that he was bound.

45. In deciding whether or not a contract is to be deduced from certain conduct, the courts are guided in each case by its particular circumstances, especially the situation of the respective parties, and their relation toward each other.

Dodson *v.* McAdams, 96 N. C. 149 (1887). Dodson sued McAdams, executor of Dodson's grandfather, John Whitaker, for the value of services which she had rendered to Whitaker. She had lived with Whitaker for twenty years until she was married at the age of twenty-three. After she was fourteen years old, she did much of the household work and helped about the farm. Whitaker paid for her schooling and treated her as one of his own children. When she married, he provided for her just as if she had been his own child. Once he casually remarked that he intended his house for her and that she should be paid for her work. *Held* that the intimate relationship between the parties overcame the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it. In a case like this, it is not presumed that compensation is to be paid by the grandchild for board and clothing, or by the grandfather for services. The presumption against a promise to pay for such services may be overthrown by an express agreement, but Whitaker's casual remarks were not sufficient proof of a contract. Remarks like these are loosely made in many families without any intention that they shall be legally binding.

46. It is more businesslike to state expressly the terms on which one expects to deal. If the intention of the parties is left to be gathered from mere conduct, perhaps their conduct will be open to several explanations. This fact may lead to a lawsuit, and possibly the decision may be against inferring a contract from the actions of the parties, even though one of them may have believed himself protected by a contract.

Yale *v.* Curtiss, 151 N. Y. 598 (1897). Curtiss often escorted Yale from church, and several times took her to entertainments. Sometimes, after bringing her home, he would enter her house and

remain for a while. When their minister was going to Europe, Yale said to Curtiss that it would be lonesome for the minister to go alone: to which Curtiss replied, "Husband and wife is party enough for me, if I go." On another occasion he said that he was going to make Yale a long visit some time. There was other evidence of this kind. Curtiss never expressly asked her to marry him. When he announced his engagement to another girl, she sued him for breach of promise. *Held* that there was no contract, although Yale had expected that Curtiss would marry her. Offer and acceptance need not be formally made, but must be sufficiently disclosed to fix the engagement as clearly as if put in formal words.

(F) There must be more than an intention to make an offer or to accept it: there must be some communication of the offeror's intention to the offeree, and of the offeree's intention to the offeror

47. The mere fact that a man harbors in his mind the intention to make an offer, does not constitute him an offeror. In order to make an offer, one must communicate it by words or conduct to him for whom it is intended. But sometimes offers are made to the world at large, as by posting notices of rewards or by public advertisements. In such case, the entire public is the offeree, and any one who learns of the offer may accept it.

Reif *v.* Paige, 55 Wis. 496 (1882). A hotel where Paige and his wife were guests was destroyed by fire. Paige offered $5,000 to any person who would rescue his wife from the burning building, dead or alive. Reif rescued Mrs. Paige's body, but Paige refused to pay the reward. *Held* that the offer was made to the public, and Reif could recover.

48. If an offeree merely concludes in his mind to accept an offer, but fails to communicate his decision to the offeror, no contract is formed. However, if the offeror demands or suggests a certain method for communicating acceptance, and the offeree accepts in the manner indicated, there is a

contract, even though the communication never actually reaches the offeror. Thus, if an offer is telegraphed, and the offeree promptly telegraphs back an acceptance, the contract is closed at once. The offeror by using the wires has impliedly suggested that the offeree should communicate his acceptance in the same way, and if the telegram of acceptance never reaches the offeror, there is a contract none the less.

White *v.* Corlies, 46 N. Y. 467 (1871). Corlies wrote White as follows: "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." White made no reply, but bought the necessary lumber and began work on it. The next day Corlies, having had no reason to suppose that White had intended to accept, countermanded his offer. White sued for damages. *Held* that White's mental determination to accept, not indicated to Corlies by word or deed, was no legal acceptance.

Washburn *v.* Fletcher, 42 Wis. 152 (1877). Fletcher mailed an offer to Washburn, who at once mailed his acceptance. The letter of acceptance miscarried. *Held* that although Fletcher had not expressly suggested that Washburn use the mails in reply, he had impliedly indicated as much by using the mails himself. Hence, as soon as Washburn's letter was posted, he communicated his acceptance in the manner desired by Fletcher, and a contract arose immediately. The subsequent loss of the letter did not prevent Washburn from enforcing the contract.

49. Acceptance cannot usually be inferred from the offeree's silence, or from his delay in rejecting the offer. If an offeree makes no answer when a proposition is laid before him, his consent cannot be taken for granted, unless he is under a duty to notify the offeror of his dissent. The mere fact that he seems pleased with the proposition, and asks the offeror for more time to investigate it, does not amount to an acceptance. Indeed, the offeree may keep putting off his decision indefinitely without coming a step nearer to making a contract.

(G) An offer may be withdrawn at any time before acceptance, even though the offeror has promised to hold it open longer

50. An offer is a voluntary proposition. Just as the offeror was free to make it originally, so he is free to revoke it at any time before acceptance. The mere fact that he has agreed to keep it open for a certain period does not prevent him from withdrawing it before the period has expired, unless it has been accepted in the meantime. His promise to hold it open is not binding, unless made under seal or for a consideration.

J. Thompson & Sons Mfg. Co. *v.* Perkins & Son, 97 Ia. 607 (1896). The company's salesman took an order for machinery from Perkins & Son, subject to the company's approval. The company wrote Perkins that they would give the matter their attention, but did not definitely accept the order, which Perkins afterwards countermanded. The company then shipped the machinery, but Perkins refused to receive it. *Held* that as the order had been canceled before acceptance, there was no contract.

Bosshardt & Wilson Co. *v.* Crescent Oil Co., 171 Pa. 109 (1895). On July 31st, 1893, Crescent Oil Co. offered to sell Bosshardt & Wilson Co. 800,000 barrels of oil, agreeing that the offer should be good for sixty days. Bosshardt & Wilson Co. made expensive preparations with a view to taking the oil. The offer was withdrawn September 25th, 1893, but on September 27th, Bosshardt & Wilson Co. attempted to accept it. *Held* that a mere offer may be canceled at any time until it is accepted. Bosshardt & Wilson Co. should have protected themselves by securing an option.

51. A promise to hold an offer open, made under seal or for a consideration, is called an option. It differs from a naked promise, because it contains the second element, seal or consideration. See Section 72.

(H) If an offeror specifies how long his offer will remain open, it may be accepted within the time set, unless previously revoked. If no time is specified, the offer, if not accepted within a reasonable time, lapses and cannot be accepted thereafter

52. If the offeror names a time during which he will keep his offer open, this is one of the terms of the offer, and acceptance must be made within the time allowed, in order to bind the offeror. If acceptance is too late, the offeror is free to disregard it.

53. If an offeror fails to state how soon the offer must be accepted, it is necessary to ascertain his intention in this respect from the surrounding circumstances. He may withdraw his offer at any time before acceptance, just as if he had given the offeree a certain period within which to accept. See Section 50. He may withdraw his offer the next moment after he utters it, even though the offeree has had no chance to make up his mind on the subject. Assuming, however, that the offer is not withdrawn, the offeree has a reasonable time within which to accept. This varies with the circumstances of each case. An offer to buy or sell stocks or commodities on the floor of an exchange must usually be accepted at once, in order to hold the offeror. Prices on an exchange often fluctuate rapidly. Hence, it is the custom among the members of most exchanges to consider an offer open only for a moment, unless otherwise stated. Again, an offer to sell perishable articles, such as ripe fruit, must naturally be understood as requiring a prompt answer. On the other hand, an offer to sell a large tract of unexplored land may be deemed to hold good for weeks, since the offeree will probably need time in order to arrive at an intelligent decision.

(I) An offer lapses if the offeree rejects it or makes a counter proposition

54. If an offeree declines the offer, the offeror is free to regard the matter as ended. Even though he may have agreed to keep the offer open for a period which has not yet expired, the offeree's rejection prevents the offer from being good any longer, unless the offeror renews it. If the offeree, having declined the proposition, says later that he will accept it, the offeror may, of course, ignore the previous rejection, but he may, if he prefers, refuse to enter into the contract.

55. If the offeree makes a counter proposition, this implies that he is dissatisfied with the offer, and amounts to a rejection of it. Therefore, the offeror need not recognize a subsequent attempt to accept.

(J) After acceptance, neither party may withdraw, or change any of the terms of the contract, without the other's consent

56. In the case of ordinary business contracts neither party is bound until the other is likewise bound. When, however, the offeree's acceptance unites with the offer a contract is formed. Thereafter neither party may withdraw without the other's consent. Even though the entire contract is to be performed far in the future, one of the parties cannot escape his obligations under it by notifying the other beforehand that he intends to drop it.

EXCEPTION. In some cases a party, in order to induce another to enter into a contract, will give him the privilege of canceling it, if he should choose later to do so. Here the right to withdraw is secured by the contract itself. See Chapter XIV (C).

57. Just as a contract cannot be completely annulled at the pleasure of a single party, so neither party can par-

tially annul it by changing any of its terms or adding new terms, without the other's consent. It is essential to a binding agreement that it shall not be subject to alteration without the consent of those who have made it.

EXCEPTION. In some cases, one of the parties is given the privilege of making changes in the terms of a contract after it has been formed. For instance, many building contracts provide that the person for whom buildings are to be erected may alter the plans, provided that he shall pay for any changes putting the builder to greater expense. Here the right to alter is secured by the contract itself. See Chapter XIV (C).

QUESTIONS

1. What is the first element necessary in all contracts?
2. What is meant by "offer and acceptance"?
3. Why are offer and acceptance necessary to form a contract?
4. May a long series of communications result in a contract?
5. What is an offeror; an offeree?
6. Can an offeree become an offeror?
7. Dunn and Hunt went through a marriage ceremony, but were jesting. They never lived together as husband and wife. Was there a valid marriage?
8. Suppose one party is jesting and the other acts seriously. Is there a contract? Give example.
9. Hand wrote, "I am authorized to offer Michigan fine salt at 85 cents per barrel. Shall be pleased to receive your order." Is that an offer?
10. How is an answer to a quotation of prices usually regarded?
11. What precaution should a person quoting prices take?
12. Is an advertisement for bids an offer?
13. What precaution should a person advertising for bids take?
14. If a party has acted on the assumption that there is a contract when there really is not, has he any redress?
15. What is the function of the court?

16. Bird offers to sell Dale a horse at a price to be fixed within thirty days by their friend Logue. Dale accepts the offer. Is there a valid contract?

17. Must words be used which can be understood by outsiders as well as by the parties to a contract?

18. What bearing have the customs of a community upon contracts made therein?

19. If a person signs a contract without reading it, is he bound by its terms?

20. Where a party gives conspicuous notice of the terms upon which he will contract, what effect has this notice upon contracts made by him?

21. How may acceptance of an offer be communicated?

22. Bird has been accustomed to send goods to Dodd, and Dodd has always accepted and paid for them. Bird makes a shipment to Dodd, which Dodd receives and keeps for a considerable length of time. He then refuses to pay for it, alleging that there was no contract on his part to do so. Is he liable?

23. Can all kinds of contracts be implied from mere conduct?

24. In deciding whether there is an implied contract what things are considered by the court?

25. What risk does a person run who fails to state expressly the terms upon which he desires to contract?

26. Must offer and acceptance be communicated?

27. How may offer and acceptance be communicated?

28. Ward advertises in a daily paper that he will pay $100 to the person who returns to him his lost dog. Hall reads the advertisement, finds the dog, and returns it to Ward. Can he enforce payment of the $100?

29. Wood wrote Bain: "I will sell you 100 bushels of wheat at $1 per bushel. Answer by return mail." Bain sent a letter of acceptance by return mail, but the letter never reached Wood. Was there an acceptance of Wood's offer?

30. Can offer and acceptance usually be inferred from silence?

31. May an offer be withdrawn even though the offeror has promised to keep it open for a certain period of time?

32. Would the fact that the offer was given for a consideration or under seal affect your answer?

33. If no time is named by the offeror, how long does an offer remain open?

34. If an offer is made for a definite period of time, would an acceptance of the offer after that period has elapsed be a good acceptance?

35. If a counter proposition is made in reply to an offer, what effect has that upon the offer?

36. If an offer is once rejected, need the offeror recognize a subsequent attempt to accept it?

37. After an offer is once accepted, may either party alter the terms of the contract?

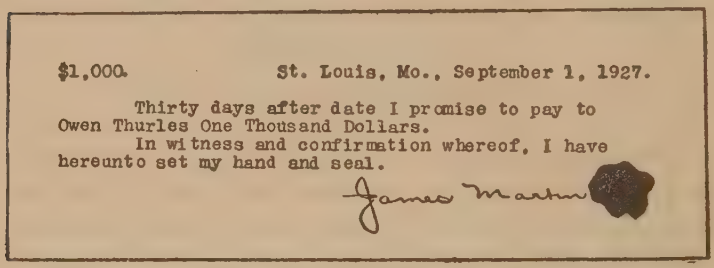
CHAPTER IV

THE SECOND ELEMENT NECESSARY IN ALL CONTRACTS, SEAL OR CONSIDERATION

(A) Introductory

58. A seal originally consisted of a piece of wax attached by a ribbon to a document, and stamped with the coat of arms or other peculiar device of the individual executing the document. The courts deemed that such document should be binding, because of the solemn manner in which it was executed. The signet rings which many persons wear are survivals of this ancient custom, similar rings having been formerly used for making an impression on wax. In course of time substitutes for the wax seal were introduced. Colored paper wafers pasted to a document were given the same legal effect as wax seals, since the intention of the parties to make their deed or contract a "sealed" one was thus indicated. Finally, a mere scroll seal resembling a paper wafer, and with the word "seal" written or printed inside it, was employed. This also indicates the intention of the parties to bring themselves within the custom which gives special validity to sealed documents, and the courts have recognized this intention. Indeed, in a few states a scratch of the pen or any mark intended to represent a seal will be given legal effect as such. For instance, the letters "L. S." are sometimes used for this purpose. These letters are the initials of the Latin words, *locus sigilli*, which mean "the place of the seal." Where any such substitute is used in place

of the old-fashioned seal, the parties should be careful to recite the fact that the document is sealed. This is done in the following specimen form of sealed contract, whereby James Martin obligates himself to pay $1,000 to Owen Thurles:



$1,000. St. Louis, Mo., September 1, 1927.

Thirty days after date I promise to pay to Owen Thurles One Thousand Dollars.

In witness and confirmation whereof, I have hereunto set my hand and seal.

James Martin

59. Consideration is something exchanged by one party to a contract for what he is to get under the terms of the contract. It consists of an act or a forbearance, or the promise thereof, which is offered by one party to a contract, and accepted by the other in return for the latter's act or forbearance, or the promise thereof.

VINAL *v.* RICHARDSON, 95 Mass. 521 (1866). George Bailey owed Vinal $19 for rent of a house belonging to Vinal, which Bailey occupied. Vinal threatened to eject Bailey, unless he should furnish security for the payment of the rent. Bailey got Richardson to sign a guaranty that Bailey would pay the rent. In a suit against Richardson on this contract, he contended that there was no consideration. *Held* that Vinal's forbearance to eject Bailey was sufficient consideration to make Richardson's guaranty binding.

60. The second element necessary in all contracts is supplied either by a seal or by consideration. In most states one of these two things is usually sufficient without the other.

(B) In what states a seal has the same binding force as consideration

61. As explained in Section 58, a promise made under seal is ordinarily binding. It makes no difference that the giver of the promise is to get nothing in return for it, because a seal takes the place of consideration. See Sections 18, 62 and 63. However, in the territory of Alaska and in the following states seals have little or no binding force: Arizona, Arkansas, California, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, South Dakota, Tennessee, Texas, and Washington. See Section 670.

(C) In certain cases consideration is needed, even in those states where a seal ordinarily suffices to make a promise binding

62. Even in those states where a seal ordinarily creates a contractual obligation, the courts refuse to enforce certain extraordinary agreements unless they are based on consideration. In general, it may be stated that if a court of equity is asked to grant an injunction or other special remedy to help sustain an agreement which lacks consideration, it will not usually give the desired relief. Thus, where a prospective heir disposes by sealed instrument of his expected share in a relative's estate, the relative being still alive, this disposition of a mere expectancy will not be enforced by a court of equity unless made for a reasonable consideration. Again, where a person agrees, under seal, not to follow his business or profession within a certain territory, this agreement will not be enforced unless made for a consideration. From Section 140 it appears that many such agreements in restraint of trade are

void, no matter how made. As to courts of equity, see Section 14.

Ross *v.* SADGBEER, 21 Wendell (N. Y.) 166 (1839). For no consideration Sadgbeer gave Ross a $2,000 bond setting forth that Sadgbeer should not, for ten years, manufacture pearl ashes within forty miles of Lockport. Ross brought suit on this bond for a violation of its provisions. *Held* that he could not recover, because the seal on a bond is not in such cases a substitute for consideration.

63. Where the parties happen to seal a contract, which is based on an interchange of consideration, the seals are not intended to create an obligation. Usually the parties to such a contract attach no importance to its being sealed, for each makes his agreement in return for what he is to get under the contract. If one of the parties breaks his side of the contract, he cannot compel the other party to fulfill the latter's side of it. Although the latter's promise was under seal, yet it was based on consideration, and the seal was not meant to be a substitute for consideration.

(D) Consideration may consist of either a benefit to the promisor or a detriment to the promisee

64. A "promisor" is one who makes a promise. A "promisee" is one to whom a promise is made. In most contracts each party promises something to the other. Each is, therefore, a promisor as respects the promise which he gives the other party, and a promisee as respects the promise given to him by the other.

65. If a promise is made in return for money, goods, land, services, or something else received by the promisor, it is based on the benefit thus obtained by the promisor. If a promise is made in return for some inconvenience, loss, or other disadvantage incurred by the promisee, it is based on the detriment which the promisee suffers by reason of the promise.

HARTZELL *v.* SAUNDERS, 49 Mo. 433 (1872). Both Hartzell and Saunders were innkeepers. Saunders held certain baggage of Irwin, a guest, as security for a hotel bill due Saunders. Irwin applied to Hartzell for accommodations, and said Hartzell should have a lien on the baggage subject to Saunders's lien. Saunders recognized the agreement, promising to hold the baggage until his own bill and Hartzell's bill should be paid. Relying on this, Hartzell accepted Irwin as a guest. Saunders let Irwin have the baggage although Hartzell's bill remained unpaid. *Held*, the detriment to Hartzell in giving Irwin credit made Saunders's promise binding, and he was liable for releasing the baggage.

HOLZ *v.* HANSON, 115 Wis. 236 (1902). Hanson agreed to pay Holz $30 if Holz would release Celia Wessie, who was in his employment, from his right to her services. Accordingly, Holz released Celia, but Hanson did not pay the promised money. Holz sued Hanson for $30. *Held* that he could recover, for Hanson's promise was sustained by the detriment which Holz suffered in return for it.

(E) The mere fact that a consideration is of slight value does not destroy its legal efficacy

66. When parties have made a contract, the courts enforce it, even though one party has a better bargain than the other. Thus, if a person agrees to pay an exorbitant price for an article which has caught his fancy, he cannot afterwards be relieved from the consequences of his own poor judgment. But see Section 136.

LAWRENCE *v.* MCCALMONT, 43 U. S. 426 (1844). For one dollar paid her by McCalmont, Mrs. Lawrence guaranteed the account of her son for goods furnished and to be furnished the son by McCalmont. McCalmont sued Mrs. Lawrence for an outstanding account of about $50,000 against the son. *Held* that a valuable consideration, however small, is sufficient. McCalmont was allowed to recover.

67. Sometimes a party agrees to do a number of different things in return for a single thing which the other

party is to do for him. Since he freely makes this contract, he cannot properly object to being forced to fulfill it.

Potter *v.* Hartnett, 148 Pa. 15 (1892). In 1871, Potter and others had a claim for $400 against Hartnett. They agreed to drop the claim if Hartnett would enter their employment. Hartnett was employed by them for a time, but afterwards they sought to enforce the claim against him. *Held* that although they had paid certain sums to Hartnett for his services, they were bound also to drop their $400 claim. They had bargained to do these two things in return for Hartnett's services.

68. The fact that a consideration is grossly inadequate is sometimes evidence of mistake, fraud, or undue influence. If sufficient other evidence is brought forward to show that the agreement lacks the fourth element, reality of consent, there is no contract. See Chapter VI.

Hume *v.* United States, 132 U. S. 406 (1889). Hume sold and delivered to the Government a quantity of shucks at 60 cents a pound, at a time when their market value was $1\frac{3}{4}$ cents a pound. He sued for the price agreed on, but the Government asserted that a mistake had been made, and that the price really intended was 60 cents a hundredweight. *Held* that Hume could recover only the market value of the shucks, the court taking the view that the agreement was so extortionate and unconscionable on its face as to raise a presumption of mistake or fraud.

69. The compromise in good faith of a disputed claim constitutes consideration. If a person in good faith demands money from another, and the latter in order to avoid a lawsuit agrees to compromise for a certain sum, he is bound to pay. He cannot escape liability on the ground that he never owed the claimant anything. The courts favor amicable adjustments of differences. One who has agreed to settle out of court a claim made in good faith, cannot prevent the enforcement of the compromise merely by proving that if the case had gone to court he would not have had to pay anything.

(F) The doing of what one is already legally bound to do is no consideration

70. If a person, bound to do a certain thing, is backward in doing it, and the other party promises him a reward for performing it, this promise is based on no consideration. There is no benefit to the promisor, for he was already entitled to punctual performance. There is no detriment to the promisee, for he was already obligated to fulfill his previous engagement. See Section 73.

Alaska Packers' Association *v.* Domenico, 117 Fed. 99 (1902). Domenico and others contracted with the Alaska Packers' Association to navigate a vessel from San Francisco to the Association's salmon canning plant in Alaska and return, and also to help catch and can salmon while there, during the fishing season. For these services they were to receive certain pay. After reaching Alaska, they refused, without cause, to perform their contract unless the Association's superintendent would promise additional compensation. The superintendent being unable to secure other men, owing to the remoteness of the place and the shortness of the season, complied with their demands, and a second agreement was signed, identical with the first except as to increased compensation. In a suit on this latter agreement, *held* that there was no consideration for it. The employees were already bound for exactly the same services at the rate originally fixed, and could recover nothing extra.

71. Where a contract has not been fully performed by either party, and it is agreed to drop it and substitute another agreement, the new contract is called a novation. The rights and obligations arising under the old contract are mutually released. The new contract may give one of the parties rights which he did not enjoy under the original contract, while the other party may be in the same position that he was in before. The latter cannot, however, object that the additional obligations cast on him by the new contract are without consideration, because the

old contract has been canceled and is not to be regarded at all.

HUMISTON v WOOD, 124 U. S. 12 (1888). Humiston undertook to sell for $25,000 the right to use his patent in certain states, to a corporation which was to be organized by Wood and others. Humiston agreed not to look to the individual incorporators for payment of the money. The project was abandoned. In a suit by Humiston against Wood and others, for the purchase price of the patent, Humiston introduced testimony tending to show an agreement, made after the one above mentioned, between him and the defendants, by which the defendants were to buy the patent rights on the terms specified in the agreement which previously had been made on behalf of the projected corporation. *Held*, if the evidence made out the case as above recited, the agreement, by which the individual incorporators were not to be personally responsible for the purchase price, would be void, as it was intended to have effect only if a corporation were organized. The second contract bound Wood and the other parties personally.

(G) A promise by one party is sufficient consideration for a promise by the other party

72. A legal obligation undertaken by one party is a detriment in the eye of the law, and constitutes consideration for a promise. Accordingly, if both parties assume reciprocal obligations, each party's promise balances and makes enforceable the other's promise. Even though nothing is paid on account, the contract is closed when the mutual promises are given. Neither party is free to destroy the contract by notifying the other that he will not perform his end of it, although the time for performance may lie far in the future.

73. The following option agreement is made a binding contract by Lee's promise to pay Smith $25. See Section 51. Smith, having for a consideration given Lee a month's refusal of a certain horse, is not free to withdraw it before the month expires. Compare this with the form of sealed contract shown in Section 58.

CHICAGO, ILL., September 1, 1918.

This agreement witnesseth that Cecil Lee promises to pay John Smith Twenty-five Dollars ($25) *one week from to-day. In consideration whereof, Smith hereby gives Lee an option, good during September,* 1918, *to purchase Smith's horse "Roanoke" for Five Hundred Dollars* ($500). *Unless Lee shall give Smith written notice by September* 30, 1918, *that he will buy the said horse at the said price, this option shall be void. If Lee should exercise this option, the said sum of* $25 *shall be applied toward the purchase price of "Roanoke." In such case the balance of the purchase price,* $475, *shall be paid to Smith six weeks from to-day, and at that time he shall deliver "Roanoke" to Lee.*

[Signed] CECIL LEE
[Signed] JOHN SMITH

74. If two or more creditors of a person agree together to accept a certain portion of their respective claims in full settlement, this composition binds them. If each of them were to make a like promise to the debtor independently of any similar promise by another creditor, it would not prevent a subsequent recovery of the balance of the claims. See Section 70. Since, however, two or more of them have reciprocally agreed to release the debtor upon being paid a fraction of their respective claims, their promises are consideration, one for another.

(H) Consideration may be present or future, but a past consideration is not sufficient to support a promise except in certain special cases

75. A motive, which leads a person to give a gratuitous promise, must not be mistaken for consideration. Gratitude for past favors may cause one to promise to do something for one's benefactor, but such promise lacks consideration and is not enforceable. The favors have already been received when the gratuitous promise is made, so the promisor gets nothing in exchange for his promise. These favors were originally conferred without an agreement to pay for them, so the promisee suffers no detriment on the strength of the promise.

76. As an exception to the foregoing rule, it is held that if a debt has existed in the past, but has been outlawed by the passage of a certain number of years, a promise to pay the debt is binding, although given without present or future consideration. See Chapter XVI as to the outlawry of debts. Likewise, if a debt has been discharged in bankruptcy by decree of court, and the debtor, although released from liability, promises his former creditor to pay it, he is bound by such promise. See Chapter XVIII as to discharge by bankruptcy.

PITTMAN *v.* ELDER, 76 Ga. 371 (1886). In 1864 Richard Pittman gave Asenath Pittman a note for $4,200, for money borrowed. In 1881, the note being unpaid, Richard Pittman indorsed on it, "I hereby renew within note with interest." In 1885 the holder of the note sued Richard Pittman. *Held* that the new promise, although made after the claim had been outlawed by the passage of time, was sustained by the original indebtedness.

(I) An agreement which has been fulfilled cannot be set aside merely because it lacks both seal and consideration

77. If a person gratuitously promises to give another money, or to render the other certain services, free of

charge, the promise, if not made under seal, is unenforceable. Nevertheless, if the promisor voluntarily keeps it, he cannot compel the promisee to return the money or to pay him for his services.

QUESTIONS

1. Trace the history of a seal.
2. Draw up a specimen form of contract which is made binding by a seal.
3. What agreements require a consideration, even in those states where a seal usually suffices to make a contract binding?
4. Draw up a specimen contract which is made binding by consideration.
5. Laws was about to oust a tenant from a farm. Meigs, out of pity for the tenant, promised Laws $50 if he would wait a month. Laws agreed, and when the month was up, sued Meigs for the money. Can he recover?
6. Cope promised his nephew James $50 if James would not smoke or play cards until he should come of age. James performed his part of the agreement, but his uncle refused to pay the money. Can James force him to do so?
7. Dill agreed to sell Hayes certain patent rights for $10. Later the patents proved to be worth $1,000,000, and Dill refused to carry out his bargain. Is he bound to do so?
8. Watt, a policeman, is on his way to arrest a thief, for whom he has a warrant. Shute, whose goods have been stolen, promises Watt $10 if he will make the arrest, which Watt does. Can Watt force Shute to pay him the promised tip?
9. Explain what is meant by a novation.
10. Draw up a specimen option agreement, and explain it.
11. Explain why a creditors' composition is binding.
12. What is a present consideration; a future consideration?
13. When is a past consideration binding?

CHAPTER V

THE THIRD ELEMENT NECESSARY IN ALL CONTRACTS, CAPACITY OF PARTIES

(A) Introductory

78. As a general rule, everybody has contractual power to make all kinds of contracts. There are, however, a few kinds of contracts which private persons have no legal capacity to form. See Sections 79 and 80. Moreover, there are certain classes of individuals whose power to enter into binding agreements is quite limited. See Section 81.

79. In some states private persons are forbidden to engage in certain kinds of business requiring public supervision, such as the railroad or fire insurance business. In all the states, most of these enterprises are conducted by corporations, which are likely to be more responsible than private persons. If an individual makes agreements into which only corporations are authorized to enter, such agreements are ordinarily void.

80. Many states require those who follow certain professions or lines of business to secure a license. One who goes into such profession or business without a license, and makes agreements in the course of his work, is usually liable to have the agreements declared void.

81. There are five classes of individuals whose capacity to form contracts is less than that of the ordinary person. These are minors, persons mentally deficient, married women, corporations, and foreigners.

(B) Contractual powers of minors

82. In most states one comes of age the day before one's twenty-first birthday. Those under age are called minors or infants. In the following states women come of age at eighteen: Arkansas, California, Colorado, North and South Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Vermont, and Washington. In Nebraska a married woman comes of age at sixteen; in Alabama, at eighteen; and in Maryland and Oregon, on being married, even though under eighteen. In Washington a woman, although under eighteen, is of age if married to a man who has reached twenty-one. In Iowa, Louisiana, and Texas all minors come of age on being married. Of course, in these states an unmarried minor comes of age as indicated above.

83. Minors are allowed to repudiate their agreements except in the case of contracts for necessaries and a few other kinds of contracts. The mere fact that a minor has had business experience and is capable of protecting his own interests does not make his agreements binding.

ALLEN *v.* LARDNER, 29 N. Y. Supp. 213 (1894). Lardner, a minor nineteen years old, agreed that Williams & Fogle should build a house on a lot owned by him. Lardner and his wife gave Williams & Fogle a mortgage to secure payment of their bill. In a suit on the mortgage, *held* that it was not valid. Even though Lardner was married, a dwelling house was not a necessary. Lardner had disaffirmed the agreement on reaching full age. The Lardners had not stated that they were of age, and it made no difference that Williams & Fogle did not know the Lardners were minors.

84. A minor has power to bind himself by the purchase of necessaries for himself, and also for his wife and children. If he pays for necessaries with borrowed money, he is liable on his promise to repay the lender.

85. The list of necessaries for which a minor may obligate himself varies in accordance with the minor's circumstances. If he has a guardian who is willing to supply him with necessaries, the minor has no legal power to buy them for himself. Likewise, if he is supplied with necessaries by his parents or anyone else. If he is thrown on his own resources, he has legal capacity to contract for food, clothing, shelter, schooling, and, if he is ill, for medicine, nursing, and medical attendance. His wealth, calling, social position, health, and in general all his surroundings, aid in determining what may be necessary for any particular minor. For example, the education suitable for a wealthy boy who expects to enter a profession might be unsuitable for a poor boy who is to work at a trade. See Section 317.

HEFFINGTON *v.* JACKSON, 96 S. W. Rep. (Texas) 108 (1906). Heffington, a minor, bought of Jackson a buggy and harness for $103. Heffington was not engaged in any work requiring the use of a buggy. In a suit against Heffington to recover the price, *held* that the buggy was not a necessary.

JORDAN *v.* COFFIELD, 70 N. C. 110 (1874). Jordan, for $104, sold to Mary Gaskins, a minor, just before her marriage, a chamber set and other articles constituting her bridal outfit. In a suit for the price, *held* that since the articles were actually necessary, Jordan was entitled to recover. Necessaries include such articles as are suitable to the state and degree in life of the person to whom they are furnished.

86. A minor who requires necessaries has power to bind himself to take only a reasonable quantity of them, and to pay only a fair price. If he orders an oversupply, he need not pay for the excess. If he promises to give an exorbitant price, he is liable only for the market value of what he receives.

NICHOLSON *v.* WILBORN, 13 Ga. 467 (1853). Wilborn sold to Mary Nelms, a minor, certain goods which would ordinarily be

classed as necessaries. In a suit to recover the price of the goods, *held*, if Mary, when Wilborn sold the goods to her, had been fully supplied with necessaries by purchases from other stores, Wilborn could recover nothing. If the minor had been supplied from any quarter, the goods furnished by Wilborn were not necessaries. To the extent that Wilborn could show that other purchases did not amount to a full supply, and to no greater extent, could he recover.

87. A minor's promise to marry is not binding. But if the marriage takes place, it cannot be set aside on the ground of minority unless the minor has not reached the marriageable age. The age at which persons may lawfully marry varies in the different states, ranging from twelve to eighteen years in the case of girls, and from fourteen to twenty-one years in the case of boys.

McConkey *v.* Barnes, 42 Ill. App. 511 (1891). Jessie McConkey sued Barnes on a promise to marry her, made by Barnes when he was nineteen years old. *Held* that Barnes was not liable on his promise to marry. The court said that the Illinois statute, providing that males over seventeen and females over fourteen years of age "may contract and be joined in marriage," did not change the rule. "To contract and be joined in marriage is one thing; to contract to marry is another. The one is executed and binding on all persons over the ages specified; the other is executory and may be avoided by an infant whether of the specified age or not."

88. Enlistment in the United States army by a minor over eighteen years is a binding contract. Enlistment in the naval service by a minor over fourteen years is valid as to him, but, if made before he reaches eighteen years and without the consent of his parents or guardian, it is voidable at their instance. In some states a minor may bind himself by a contract of apprenticeship.

89. As stated in Section 83, most agreements made by a minor may be repudiated by him. Thus, if a boy, just before coming of age, agrees to buy from an adult goods which are not necessaries, the boy may, after coming of

age, either affirm or disaffirm it. It is called voidable, for the boy can avoid it. But if the boy chooses to enforce it, the adult must fulfill his part of it. If the former minor, after coming of age, affirms an agreement, he cannot later disaffirm it.

DERRICK *v.* KENNEDY, 4 Porter (Ala.) 41 (1836). Albert Kennedy, a minor, sold certain property to William Kennedy. Afterwards, and while still a minor, Albert sold the same property to Derrick. On coming of age, Albert ratified the sale to Derrick, and later ratified the sale to William. In a suit by William against Derrick, who had taken the property, *held* that judgment should be for Derrick, because, having ratified the sale to Derrick, Albert had no power afterwards to disaffirm it and ratify the first sale.

90. A voidable agreement cannot be partially affirmed and partially disaffirmed. If the former minor repudiates an agreement, whatever property he has received under it must be returned to the other party, in case such property was still in the minor's possession when he came of age. If, however, before coming of age he has consumed or lost what he received under the contract, he may, nevertheless, recover from the other party what the latter got from him. In this case he need restore nothing to the other party. But if he has willfully destroyed what he received, he must return its value to the other party in order to get back what the other party obtained from him.

EXCEPTION. In New Hampshire and a few more states, a minor's contract, if fair to him, cannot be set aside by him unless he restores what he has received thereunder to the other party.

CURRY *v.* ST. JOHN PLOW CO., 55 Ill. App. 82 (1893). The plow company sold a plow to Curry, a minor, who gave the company his note for $20, the purchase price. After Curry came of age, he was sued on the note. He had the plow in his possession at the time of trial, never having returned or offered to return it. *Held* that the fact of his having been a minor when he bought it was no defense, because Curry could not retain the plow and refuse to pay for it.

91. A minor is liable to pay damages for such wrongful acts as slander, libel, negligent injury to another's person or property, deceit, and malicious prosecution. These acts are called torts.

BULLOCK *v.* BABCOCK, 3 Wendell (N. Y.) 391 (1829). Babcock, twelve years old, negligently shot an arrow and put out one of the eyes of Bullock, his playmate. In a suit by Bullock against Babcock to recover for the damage, *held* that Babcock was liable.

(C) Contractual powers of persons mentally deficient

92. If by decree of court a person has been declared a lunatic or habitual drunkard, and a guardian has been appointed for him, agreements should be made only with the guardian. The afflicted person himself has no contractual capacity except to secure necessaries when the guardian fails to supply them. See Sections 84–86.

WADSWORTH *v.* SHARPSTEEN, 8 N. Y. 388 (1853). Sharpsteen was adjudged to be an habitual drunkard, and a committee was appointed for him. Subsequently, Wadsworth, who had no actual knowledge of these facts, became the holder of a draft on which Sharpsteen was indorser. Wadsworth got Sharpsteen, when the latter was sober, to agree to waive protest of the draft. In a suit against Sharpsteen, on the draft, *held* that Sharpsteen was incapable of waiving protest, and that the hardship on Wadsworth was no greater than if he had dealt with a minor believing him to be of full age.

93. If the afflicted person has never been judicially declared an incompetent, his agreements for necessaries are usually binding. The validity of his other agreements depends on the surrounding circumstances. If he deals with a person who has no reason to suspect his condition and who treats him quite fairly, he is ordinarily bound. Otherwise, he may usually repudiate the agreement.

WATERMAN *v.* HIGGINS, 28 Fla. 660 (1891). Three months before his death, Waterman deeded certain property to his second

wife and her son. After his death, Waterman's children by his first marriage brought suit to have the deed set aside on the ground that Waterman was debilitated when he made it. *Held* that the deed should stand. Mere mental weakness will not justify a court in setting aside a contract, if it does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence.

94. The mere fact that one is enfeebled by old age or sickness, or excited by intoxicants, does not necessarily render one's agreements voidable, in the absence of proof that the other party took unfair advantage of one's condition.

Loftus *v.* Maloney, 89 Va. 577 (1893). In May, 1890, Loftus and Maloney became partners in a saloon business. Maloney put in $1,350, and Loftus $1,000. The firm then erected a building costing $1,800, and furnished it with a stock costing about $1,500, which was bought on credit. In July, 1890, the saloon being a going concern, Maloney bought out the interest of Loftus for $2,750, and agreed to assume the firm debts. Loftus afterwards sued Maloney to set aside the contract, alleging that he, Loftus, was drunk at the time of sale. *Held* that the contract would not be set aside, the weight of the evidence showing that, while Loftus had been drinking before he made the contract, yet he was not incapacitated, that Maloney had not been guilty of any improper conduct, and that the bargain was not one-sided.

95. An insane person, whether under guardianship or not, is liable for his torts. See Section 91.

(D) Contractual powers of married women

96. In ancient times married women were not allowed to make contracts, but their disability has been largely removed by statute. The legislation on this topic varies in the different states.

97. If a woman is abandoned by her husband, she may engage in business and deal with her own property as if

she were unmarried. The laws of some states lay down certain conditions with which the deserted wife must comply, in order to secure these powers.

98. Property may be given to a married woman for her sole and separate use. See Section 839. The giver may expressly empower her to dispose of this property or make other contracts regarding it. In most states, even though no such power is expressly granted to her, she has implied power to make such contracts.

99. Besides conferring the powers above mentioned, the laws of most states authorize married women to make nearly every other kind of contract. But a married woman is generally incapable of binding herself as a surety or guarantor. See Section 698. Moreover, the consent of her husband is usually required to validate her agreements for selling or mortgaging her real estate.

(E) Contractual powers of foreigners

100. In general, foreigners, whether citizens of another state of the Union or of a different nation, have full contractual powers. They will be aided by the courts of any state in enforcing contracts against its own citizens.

101. But if the nation to which a foreigner belongs is at war with the United States an agreement which he may make with a citizen of the United States, looking to commercial intercourse between the hostile countries, is void. Sometimes, however, in the interest of trade, this rule is relaxed either by treaty or by special trading license or by tacit agreement.

102. Many states limit the holding of land by citizens of foreign countries. An agreement whereby a foreigner seeks to acquire land in violation of law is not binding.

103. As to foreign corporations, see Chapter XXXIV.

(F) Contractual powers of corporations

104. Corporations are chartered to accomplish certain objects. As explained in Chapter XXVI, they have not only those powers which are expressly granted to them, but also those which are reasonably necessary and suitable for the attainment of their purposes.

QUESTIONS

1. What contractual capacity has an ordinary person?
2. What classes of individuals have less than the ordinary contractual capacity?
3. When does a minor become of age?
4. What contractual powers do minors have?
5. Make out a list of necessaries for: (1) a poor city girl, whose father is a carpenter; (2) a wealthy farmer's son, who lives ten miles from the nearest school.
6. Houch, when fifteen years old, bought a large sail boat from Burt. He signed an agreement to pay $1,000 for it. This agreement contained a promise that Houch would give Burt a written affirmance of the bargain after reaching full age. When he came of age, Houch declined to sign an affirmance, but continued to sail the boat for six months. Then it was lost in a storm. May Burt force Houch to pay?
7. What is a minor's liability for torts?
8. What contractual capacity has a lunatic: (1) if under guardianship; (2) if not under guardianship?
9. Boles is a heavy drinker, but never quite loses control of himself. Are agreements made by him in a half drunken condition binding?
10. What limitations are put on the capacity of married women to contract?
11. Graves, a Londoner, arranged to buy cotton from Byrne, an Alabaman, during the War of 1812. The cotton was to be exported at once to England. Was the agreement valid?

CHAPTER VI

THE FOURTH ELEMENT NECESSARY IN ALL CONTRACTS, REALITY OF CONSENT

105. In most cases when the first element, offer and acceptance, appears in an agreement, it is taken for granted that the fourth element, reality of consent, is also present. The presence of offer and acceptance usually indicates that the minds of the parties have met on a given proposition and are in complete accord. But sometimes the consent shown by offer and acceptance is merely superficial, not real.

106. Any one of five different things may deprive an agreement of reality of consent: first, mistake; second, misrepresentation; third, fraud; fourth, undue influence; fifth, force. These five things will be treated separately.

107. Ordinarily, when a party discovers that an agreement lacks the element reality of consent, he should proceed at once to have it set aside. If he delays, he may be held to have waived his rights. Even though he acts promptly, he may find that the rights of innocent third parties have become involved. In such cases the courts usually decline to annul an agreement.

(A) Mistake

108. Very few mistakes are of sufficient importance to nullify an agreement. Usually one who makes a bargain under an erroneous idea as to the facts bearing on the matter cannot disaffirm the transaction on discovering his

mistake. Ordinarily a person is expected to make sure of his ground before entering into a contract, and if he fails to do so he has only himself to blame.

Western German Savings Bank *v.* Farmers & Drovers Bank, 73 Ky. 669 (1874). The two banks had been defrauded by two different persons, who were mistakenly supposed to be the same person. The banks agreed to unite in an effort to capture the supposed thief, and to divide the expense incurred, as well as any money which might be recovered. One of the thieves was captured, and upon him was found the identical money stolen from the Western Bank. The Western Bank tried to set aside the contract on the ground of mistake. *Held* that the contract must be enforced, both parties having had the same means of information with reference to the bank transactions, at the time the contract was made.

109. In some cases, however, it is the duty of one party to tell the other all the material facts. If he does not fulfill this duty, and the other party makes an agreement under a mistake as to some essential feature of the case, the latter may repudiate it on learning the truth. See Chapter XX (A), Chapter XXIII (C), Chapter LIV (A), Chapter LV (B), and Chapter LVI (B).

110. Again, if one party gives his consent to a bargain under an obvious delusion, the other will sometimes be denied enforcement of the agreement because he must have been aware of the first party's mistake, and should not be allowed to take advantage of it.

Harran *v.* Foley, 62 Wis. 584 (1885). Foley offered to sell Harran ten head of cattle for $270. Harran refused. A few hours later, however, Foley agreed to sell Harran the cattle for a lower price, which Foley understood to be $261, and which Harran understood to be $161. When the discrepancy became known to Foley he refused to deliver the cattle. In a suit by Harran against Foley, for the cattle, it appeared that they were worth at least $250, and that an offer of $255 had been refused by Foley, as Harran knew. *Held* that if Foley said $161 when he meant $261,

Harran could not enforce the bargain, because he had snapped at an offer which he must have seen was a mistake.

111. Where both parties labor under a mistake of fundamental importance, the agreement is void. Thus, where the parties use ambiguous language, and each has in mind an entirely different subject matter as the basis of the agreement, there is no reality of consent, and hence no contract.

BRANCH *v.* COOPER, 82 Ga. 512 (1889). Branch and Cooper were partners. At the end of a certain year the firm books showed the amount credited to Cooper as about $10,500. On this valuation Branch bought Cooper's interest for $10,000. Long afterwards it appeared that the books were wrong and that Cooper's interest should have been stated as $5,100. The error was unknown to both parties at the time of the sale. *Held* that the mistake should be rectified. If it had been discovered before the sale was completed, the agreement could have been set aside. As it was too late for that, the court ordered Cooper to pay back a certain part of the money.

(B) Misrepresentation

112. Misrepresentation as here considered exists when one party to a contract innocently misleads the other as to some material fact, and so obtains the latter's consent under a misconception. In order to defeat an agreement on the ground of misrepresentation, it must be proved that one party was justified in relying on the other's statement, and was misled thereby to his injury. It is unsafe to rely on statements made in the course of negotiations, unless they are warranted to be true by the party making them.

NATIONAL CASH REGISTER CO. *v.* TOWNSEND, 137 N. C. 652 (1905). The Cash Register Co. sold a cash register to Townsend. When sued for the price, Townsend set up that he was induced to buy the machine by the misrepresentation of the company's agent, and that he had rescinded the contract for this reason. He proved

that the agent stated to him that the cash register would enable him to do business with one clerk less; that Townsend said that if this was true, he would take the machine. The machine did not save the time of a clerk. Indeed, it took a little more time than the old method, largely because Townsend was not experienced in using it. *Held* that the agent's statements were expressions of commendation on which Townsend could not rely; and hence the contract was enforceable.

113. When an agent makes an agreement with his principal concerning the latter's property in the agent's charge, usually the principal may disaffirm it if the agent's representations turn out to be incorrect. The confidence placed in the agent makes him liable for the truth of such assertions. Likewise, if a parent deals with a child, the latter, whether under age or over, naturally puts implicit trust in the parent's statements. If these prove to be incorrect, the child may set aside an agreement which he has made on the faith of them. The same rule governs a guardian in dealings with his ward and a trustee in dealings with those whose property is placed in his charge.

THWEATT *v.* FREEMAN, 84 S. W. (Ark.) 720 (1905). Freeman lived in Chicago. Owning land in Arkansas which he wanted to sell, he employed Thweatt, an Arkansas lawyer, to sell it. After some correspondence which showed that Freeman was relying entirely on Thweatt's judgment in the matter, Thweatt wrote Freeman that $2,000 was a fair price for the land. Freeman agreed to a sale at that price, and Thweatt was one of the purchasers. The property was really worth at least $5,000. In a suit by Freeman against the purchasers, *held* that the sale should be set aside even though Thweatt may not intentionally have imposed on Freeman.

114. One who insures another's person or property may refuse to pay the insurance money in case the party insured has misrepresented the facts. Likewise, a misrepresentation made to a surety or a guarantor by the party whom he agrees to indemnify will vitiate the agreement.

In such cases the insurer, surety, or guarantor usually knows less of the facts than the other party; hence the courts allow him to act on the faith of the other party's statements, though they are not warranted to be true. In certain other agreements, where only one party is in a position to know the facts, and he misrepresents them to the other, the latter may repudiate the bargain upon learning the truth.

(C) Fraud

115. Fraud adds to the idea of misrepresentation that of malicious deceit. The courts are far more ready to set aside an agreement, if tainted by fraud, than if the only objection to it is an innocent misstatement made by one party to another.

116. An untrue statement, not known to be false by the party uttering it, but made with a reckless disregard as to whether it is correct or incorrect, is deemed fraudulent.

117. Fraud may take the shape of artifice either positively misleading a party as to certain facts, or else suppressing sources of information and preventing disclosure of the truth.

STACKPOLE *v.* HANCOCK, 40 Fla. 362 (1898). Hancock wanted to buy Connor's land. He told Connor that the land did not contain phosphate, although he knew that phosphate was there. Connor, relying on Hancock's statement, conveyed the land. *Held* that the conveyance should be set aside.

CLARK *v.* CLARK, 55 N. J. Eq. 814 (1896). Luke Clark struck and badly injured his daughter Emily. Long after the statute of limitations had outlawed Emily's claim for damages, her lawyer, Fisk, induced Luke to sign an arbitration agreement. Fisk concealed the fact that the statute of limitations was a complete answer to the claim, and stated to Luke that as a jury would sympathize

with a woman, it was better to arbitrate. The arbitration agreement contained a clause "Expressly waiving all statutory and technical questions." The arbitrator decided against Luke who appealed to court for relief. *Held* that relief should be granted, for Fisk had deceitfully led Luke to forego his right to a jury trial in open court (which would have revealed the outlawry of Emily's claim) and to arbitrate the matter privately under an agreement which cunningly deprived Luke of a perfect defense.

118. A representation as to what will happen in the future, however misleading, is not deemed fraudulent, unless coupled with a misstatement as to some past or present fact. Such representations are mere expressions of opinion. One desiring to rely on them should insist on their being warranted by the party who makes them.

119. A party seeking to defeat an agreement on the ground of fraud must prove that he was deceived into making it. He cannot take advantage of the other party's false statements unless (1) he believed them, and (2) was led thereby into giving his assent, and (3) has suffered loss by reason of the fraud.

HOOKER *v.* MIDLAND STEEL CO., 215 Ill. 444 (1905). Hooker owned seventy-two shares of stock in the Midland Steel Co., par $100. He was offered $18,000 for his stock by Beatty, the president of the company. Hooker was suspicious of Beatty's statements regarding the value of the stock and the condition of the company. He made an independent investigation, as a result of which he accepted Beatty's offer. Some months later, Hooker became convinced that Beatty's statements were fraudulent, and that the stock was worth at least $32,000. He then brought suit to recover the difference, $14,000. *Held* that he could not recover, as he had not relied on Beatty's statements.

(D) Undue influence

120. Undue influence is a mixture of fraud, which has just been treated, and force, which we shall treat next in

order. If one person gains a mastery over another, any agreement which the latter may enter into under the former's domination does not possess the element reality of consent. While the first element, offer and acceptance, may be present, yet the consent of the party who cannot resist the other, and think and act for himself, is not the genuine expression of his own will.

121. Undue influence is sometimes exerted by one member of a family or household over another. Or by an attorney over his client. Or by a doctor over his patient. It may be acquired by one person over another in the course of business dealings.

TUCKE *v.* BUCHHOLZ, 43 Ia. 415 (1876). Buchholz induced his stepchildren, toward whom he had stood in a parental relation for many years, to agree to sell him their land. They were then of age, but they knew little of business, and were still under his direct influence. The agreement was signed at his solicitation, and upon requests that were, in effect, commands. The purchase price was less than half the market value of the land. *Held* that the agreement should be set aside.

122. In order to set aside a contract on the score of undue influence, the proof must be clear and convincing. The mere fact that the consent of one party was obtained through the constant nagging of the other is insufficient to show that the party who was finally induced to make the contract had ceased to be his own master.

123. Questions of capacity to contract may become involved with this subject of undue influence. A man who would be regarded as having just enough mental capacity to make ordinary contracts may in some cases repudiate a contract entered into by him with one who has acquired mastery over him, and abused this power to secure an unfair advantage.

(E) Force

124. Where a person is induced to make an agreement by threats of bodily violence, he may afterwards repudiate it. Likewise, if he is kidnapped or unlawfully committed to prison, a promise wrung from him as a condition of his release is not binding. Likewise, a promise extorted from one by threats that unless it is given one's property will be wantonly destroyed.

Bailey *v.* Devine, 51 S. E. (Ga.) 603 (1905). W. H. Bailey killed a man. His mother engaged Devine, a lawyer, to defend him, and paid Devine $1,000, which was the fee agreed upon. On the day the case was set for trial, Devine told Mrs. Bailey and her son that a note for $500 would have to be signed by them in favor of Devine and another lawyer, to pay the latter for getting the release of some men who had been held as witnesses against the son. The mother and son signed the note upon Devine's threat that otherwise he would postpone the case and keep the son in jail indefinitely. In a suit on the note, *held* that it had been obtained through improper coercion, and was invalid.

Tandy *v.* Elmore-Cooper Live Stock Co., 87 S. W. (Okla.) 614. (1905). Hudson, who owned certain cattle, mortgaged them to the Live Stock Company. He then made a contract with Tandy under which the latter pastured the cattle for some months. Hudson having defaulted, the Live Stock Company tried to seize the cattle under the mortgage; but Tandy would not surrender them unless his claim for pasturage was paid, although under the Oklahoma law he had no right to enforce his claim by detaining the cattle. Winter was coming on, and it was necessary to remove the cattle in order to preserve them. Therefore, the Live Stock Company guaranteed Hudson's note which had been given for Tandy's charges, and the cattle were released. In a suit against the Live Stock Company on the guaranty, *held* that the company was not liable because of the constraint under which the guaranty had been signed.

125. If one's own liberty, person, or property is not imperiled, an agreement made to relieve another party is not

voidable on the ground of force, unless that other party is a member of one's immediate family. Promises made in order to rescue a husband, a parent, or a child from unlawful detention or threatened violence are voidable.

HEATON *v.* NORTON COUNTY STATE BANK, 59 Kan. 281 (1898). Heaton was cashier of the Norton Bank, which failed. Burton, the president of the bank, went to Heaton's wife and told her that Heaton was an embezzler, and would be arrested unless the wife should transfer her bank stock to Burton. Moved by this threat, Mrs. Heaton made the transfer. Later she sued the bank and Burton to recover the value of the stock. It did not appear that there had been any lawful cause for arresting Heaton. *Held* that Mrs. Heaton was entitled to recover.

QUESTIONS

1. What various things may deprive an agreement of the fourth element, reality of consent?

2. Root agrees to buy from Hare, a Kansan, a quantity of seed, believing it suitable for use in Canada, where he has a farm. He soon learns his mistake, and refuses to take the seed. May Hare, who has not caused the mistake, enforce the agreement against Root?

3. Explain the advantage of insisting that one who is dealing with you shall warrant the truth of his representations.

4. In what special cases is a party bound by his representations without any express warranty?

5. What is the difference between fraud and misrepresentation?

6. In order to upset an agreement on the ground of fraud, what must be proved?

7. Give an example of an agreement which could be set aside on the ground of undue influence.

8. In what various ways may force invalidate an agreement?

CHAPTER VII

THE FIFTH ELEMENT NECESSARY IN ALL CONTRACTS, LEGALITY

126. The courts will not lend their aid to accomplish wrong. Where an agreement has an illegal object it is no contract, because it is not enforceable at law.

127. Apart from agreements made with a positively illegal object, there are some agreements which have a perfectly innocent object, but which were certainly never intended to be enforced at law, and which, therefore, do not possess the fifth element, legality. A purely social engagement made by two persons to dine or walk together lacks the fifth element, for if the engagement were broken the disappointed party would have no redress in a court of law. The parties do not contemplate entering into a legal relation with each other, giving rise to contractual rights and obligations.

128. Aside from purely social agreements and those of a similar character, which are outside the sphere of governmental intervention, pretty much every agreement possesses the fifth element, unless it has a positively improper object in view.

129. There are three different kinds of agreements which are positively improper: (A) those which violate the Constitution or the statute laws of the United States or of the state to which the parties are subject, or which violate Federal treaties; (B) those which interfere with the proper conduct of government in any of its branches;

(C) those which tend to injure the public as a body or to wrong some particular member thereof.

(A) Agreements violating Constitutional or statute law or federal treaties

130. It is obvious that the courts will not enforce an agreement which runs directly counter to a provision of the Constitution or the statute laws either of the United States or of the state to which the parties are subject, or which infringes a treaty made between our country and a foreign nation. There are countless laws which may invalidate agreements formed in disobedience to them, but it will suffice to mention a few of the most important.

1. Sunday agreements

131. The statute law of most states forbids the transaction of worldly business on Sunday. But the courts will usually enforce a business agreement entered into on Sunday if it has been recognized by the parties as valid on a subsequent week day.

EVERT *v.* KLEIMENHAGEN, 60 N. W. (S. D.) 851 (1894). One Sunday Kleimenhagen agreed to sell Evert two horses, warranting their soundness. The next day the parties met, according to promise, and the horses were delivered. Later, Evert sued for breach of the warranty as to soundness. Kleimenhagen contended that as the warranty had been made on Sunday, it was invalid. *Held* that the whole contract was good, for the Sunday agreement had been ratified by the delivery of the horses on Monday.

132. A Sunday contract in aid of a church or other charity, or concerning matters apart from worldly business affairs is not affected by the statute. For instance, a Sunday contract whereby a man hires a carriage in order to visit his father is enforceable.

2. Gambling agreements

133. In almost every state gambling is discountenanced by statute. Accordingly, bets on horse races or games of chance, and all similar agreements, are unenforceable.

134. If one lends money to another, in order to enable him to gamble, one cannot recover it, for it is lent in furtherance of an illegal transaction. If one merely has knowledge of the use to which the borrower intends to put the money, and lends it to him without any purpose of encouraging him to gamble, one is not a guilty participant in the illegal transaction and can recover the money.

135. A distinction should be carefully drawn between *bucket-shop transactions* in stocks and grains on the one hand and *investments on margin* on the other hand. In a bucket-shop the customers merely bet with the proprietor on the fluctuations of market prices. There is no real sale or purchase of the securities or commodities concerned. On the contrary, when an investor or speculator goes to a legitimate broker and orders him to buy, say, twenty shares of Northern Pacific Railroad stock or a hundred bushels of wheat on margin, the broker really fills the order, and there is a perfectly legal contract of sale. The mere fact that the broker lends his customer a large part of the purchase money does not invalidate the contract, any more than when a real estate agent lends the purchaser of a house part of the purchase money on mortgage.

3. Usurious agreements

136. In order to prevent a borrower from being at the mercy of a money lender, the statutes of most states limit the rate of interest which may be charged for the use of money. But the parties are free to fix any lower rate than that established by law. The following table shows: (1) the rate which is chargeable in the absence of any

agreement on this point between borrower and lender; (2) the maximum rate allowed by the various states; (3) the penalty suffered by those who stipulate for a higher rate of interest than the maximum, omitting certain criminal penalties. In some states the penalty is heavier if the usury is actually collected. In many states the maximum rate cannot be validly contracted for save by writing.

State.	Legal Rate.	Maximum Rate.	Penalty for Exceeding Maximum Rate.
Alabama	8	8	Loss of all interest.
Alaska	8	12	Loss of double interest.
Arizona	6	10	No penalty.
Arkansas	6	10	Loss of principal and interest.
California	7	12	No penalty.
Colorado	8	No limit	No penalty.
Connecticut	6	12	Loss of principal and interest; fine and imprisonment.
Delaware	6	6	Loss of principal and interest.
District of Columbia	6	8	Loss of all interest.
Florida	8	10	Loss of all interest.
Georgia	7	8	Loss of all interest.
Idaho	7	10	Loss of all interest.
Illinois	5	7	Loss of all interest.
Indiana	6	8	Loss of excess interest.
Iowa	6	8	Loss of all interest, costs and 8% of principal.
Kansas	6	10	Loss of excess interest.
Kentucky	6	6	Loss of excess interest.
Louisiana	5	8	Loss of all interest.
Maine	6	No limit	No penalty.
Maryland	6	6	Loss of excess interest.
Massachusetts	6	No limit	Interest on loans under $1,000 dischargeable by payment of 18% of principal.
Michigan	5	7	Loss of all interest.
Minnesota	6	8	Loss of principal and interest.
Mississippi	6	8	Loss of all interest.
Missouri	6	8	Loss of excess interest, payment of court costs and reasonable attorney's fees. Mortgage or pledge of personal property rendered invalid.
Montana	8	10	Loss of double interest.
Nebraska	7	10	Loss of all interest.
Nevada	7	No limit	No penalty.

State.	Legal Rate.	Maximum Rate.	Penalty for Exceeding Maximum Rate.
New Hampshire	6	No limit	No penalty.
New Jersey	6	6	Loss of all interest and costs.
New Mexico	6	12	Loss of double excess interest; fine.
New York	6	6	Loss of principal and interest.
North Carolina	6	6	Loss of double interest.
North Dakota	6	9	Loss of all interest.
Ohio	6	8	A contract for more than 8% is void as to interest and recovery limited to principal sum and 6%.
Oklahoma	6	10	Loss of double interest.
Oregon	6	10	Loss of principal and interest.
Pennsylvania	6	6	Loss of excess interest.
Rhode Island	6	30*	Loss of principal and interest.
South Carolina	7	8	Loss of double interest.
South Dakota	7	10	Loss of all interest; fine and imprisonment.
Tennessee	6	6	Loss of excess interest; fine and imprisonment.
Texas	6	10	Loss of double interest.
Utah	8	12	Loss of all interest; fine and imprisonment.
Vermont	6	6	Loss of excess interest.
Virginia	6	6	Loss of all interest.
Washington	6	12	Loss of double interest; costs.
West Virginia	6	6	Loss of excess interest.
Wisconsin	6	10	Loss of treble interest.
Wyoming	7	10	Loss of all interest.

* On loans exceeding $50.

137. The foregoing table gives only the general interest law of the various states. In most states a few exceptions are made to the general law. For instance, in many states mutual building and loan associations are allowed to charge their members more than the usual maximum rate of interest.

(B) Agreements interfering with the public government

138. The second class of agreements which lack legality of object are those which interfere with the proper conduct of government in any of its branches, executive, legislative, or judicial. For instance, an agreement guaranteeing the removal of a United States post office to a certain

store is void, because it savors of corrupt influence. So is an agreement to obtain a pardon for a convict or to procure certain legislation. Public affairs are to be regulated by the laws enacted for that purpose, and the regular course of procedure should not be interfered with by any selfish interests, such as would be created by private bargains concerning these matters.

Drake *v.* Lauer, 86 N. Y. Supp. 986 (1904). C agreed with Lauer to obtain from the State Engineer the estimates of the cost of work on the Erie Canal, which were not open to other bidders on the work. C also agreed to secure contracts by favoritism from state officers, with whom he had social and political relations. In a suit against Lauer to recover payment for C's services, *held* that there could be no recovery, the agreement being void.

139. An agreement to pay money for stifling a criminal prosecution is usually void. It tends to obstruct justice if some one who is concerned in the prosecution of a wrongdoer bargains with him to suppress the criminal proceedings. But if a crime, in addition to subjecting the offender to public prosecution, also renders him liable to pay money damages to some citizen, the latter may compromise his private cause of action; he should not, however, agree to obstruct any criminal proceedings which may be taken.

Powell *v.* Flanary, 109 Ky. 342 (1900). Powell employed Flanary to purchase wheat for him, and gave Flanary two blank checks signed by Powell. He authorized Flanary to fill out the checks to pay for the wheat. One check Flanary made payable to himself for $250, cashed it and used the proceeds for himself personally. On learning of this, Powell told Flanary that he had committed a penitentiary offense, whereupon Flanary and others gave a note for $250 to Powell. No promise was made not to prosecute criminally, but as a matter of fact Flanary was not prosecuted. In a suit on the note, the defense was that it had been given for an unlawful purpose. *Held* that Powell could recover, there having been no agreement not to prosecute Flanary.

(C) Agreements injurious to the people at large or to particular individuals

140. The third class of agreements with an illegal object are those tending to injure the public as a body or a particular member thereof. Such an agreement is one aiming to destroy competition. For centuries judges have refused to enforce certain agreements in restraint of free competition. To-day this matter is partly regulated by the Acts of Congress of July 2, 1890, and October 15, 1914, known respectively as the Sherman Act and the Clayton Anti-Trust Act, which forbid and penalize monopolies restricting commerce among the several states or with foreign nations.

CRAVENS *v.* CARTER-CRUME CO., 92 Fed. 479 (1899). Cravens and others, controlling eighty per cent of the total product of wooden dishes throughout the country, formed a combination to restrict the production of wooden dishes and keep up prices. Cravens agreed with the Carter-Crume Company that for $9,000 he would close his factory for a year and that he would not sell wooden dishes to any third person during the continuance of the agreement. This was part of a general scheme to bring all such factories under one management in order to control prices. In a suit by Cravens to recover the $9,000, *held* that there could be no recovery, the agreement being void.

141. When a man is selling out his business he can often get a better price if a term may be inserted in the agreement of sale legally binding the seller not to compete in the territory which he has been covering, at least for a limited space of time. If the courts refused to enforce an agreement of this kind many persons retiring from business would be unable to get the fair value of their good will, for the purchasers could not be sure but that those who had sold out to them would open up again in the same neighborhood, and retain all their old trade. It is lawful to make an agreement in partial restraint of com-

petition which is reasonable under the circumstances. An agreement to sell a retail shop in a small town may properly provide that the seller must not open up a rival shop in the same town. It would be unreasonable for that particular shopkeeper to bind himself not to engage in the same business in any part of the state, for such a sweeping restraint would be unnecessary for the purchaser's protection. See Section 62.

COOPER *v.* EDEBURN, 198 Pa. 229 (1901). In 1899 Cooper and Edeburn, surveyors, dissolved the partnership which they had conducted. Cooper paid Edeburn $4,517 for the latter's share of the firm assets, Edeburn promising, as part of the bargain, not to go into the same business again in Allegheny County. Afterwards he broke this agreement, and Cooper applied for an injunction to restrain him from following the business in the county. *Held* that the restraint on Edeburn was reasonable, and that he must live up to his agreement.

ROBERTS *v.* LEMONT, 102 N. W. (Neb.) 770 (1905). Lemont sold out his insurance business to Roberts, agreeing not to engage in that business again. The restraint was not limited as to time or place. In a suit by Roberts to prevent Lemont from writing insurance in Norfolk where Roberts lived, *held* that the prohibition was void, it being against public policy to restrain a person utterly from following a line of business anywhere or at any time. If the parties had agreed that Lemont should not follow the insurance business in Norfolk, that agreement would have been deemed reasonable and enforced at law. But since the agreement was unreasonably broad, it was not enforceable even as to Norfolk.

142. In the sale of concerns whose trade is widespread, the restraints imposed upon the seller may be correspondingly greater, in order to protect the purchaser in the enjoyment of the business which he buys. Where the restraint as to territory extends over the entire country, it is wise to insert a limit as to the time during which it shall last, for the courts do not want to keep a man from

pursuing his particular line of business in any part of the country and for the rest of his life. Even where the restriction as to territory is narrowly limited, a further limit as to the time during which it shall last is often inserted as a measure of precaution, especially where the man to be restricted is not selling out a business, but is merely getting employment from the people with whom he promises not to compete. Thus, a driver, when he is hired to deliver milk over a certain route, may legally bind himself, in consideration of being given employment, not to sell milk for anybody else over that route for one year after the expiration of the employment.

143. As a rule, an agreement by a purchaser of goods to maintain the price fixed by the seller is not upheld. This rule applies even to sales of patented articles by the patentee, as well as to sales of special makes of goods bearing a proprietary trade-mark. Likewise, the holder of a copyright may not bind those dealing in the copyrighted work to maintain certain stipulated prices.

STRAUS AND STRAUS *v.* AMERICAN PUBLISHERS' ASSOCIATION, 231 U. S. 222 (1913). Most of the publishers and booksellers throughout the country entered into an agreement to prevent price-cutting. Straus and Straus, who cut prices, were blacklisted and prevented from dealing in certain books. They sought an injunction to restrain the American Publishers' Association from interfering with their purchase and sale of books, and also demanded damages for the losses suffered by them. *Held* that it was unlawful for the American Publishers' Association to prevent Straus and Straus from obtaining a supply of books, and that even the copyright statute does not entitle a publisher to control all retailers who may ultimately purchase some of the books issued by him. The statute is not intended to authorize agreements in unlawful restraint of trade.

144. Agreements improperly affecting domestic relations will not be enforced. The courts favor the institution of marriage. For example, if a husband promises his wife money for not resisting his divorce suit, the promise is unenforceable.

GROBE'S ESTATE, 127 Ia. 121 (1905). Grobe agreed to pay Mrs. Aldinger $200 if she would go to Chicago to see a woman whom he was desirous of marrying, and give this woman information about him which might induce her to marry him. Mrs. Aldinger performed her part of the agreement, and tried to enforce payment of her $200 claim. *Held* that the agreement was unenforceable because it was a marriage brokerage agreement, which is against public policy.

145. An agreement tending to make a trustee or an agent violate his duty is also against public policy. Therefore, if a director of a corporation is promised a sum of money for withdrawing his opposition to a transaction which is against the corporation's interest, he cannot secure the aid of the courts in enforcing the promise.

ELLICOTT *v.* CHAMBERLIN, 38 N. J. Eq. 604 (1884). Elisha Warford died leaving a will by which he directed his executors, of whom Chamberlin was one, to invest all his estate for the benefit of his daughter, Mrs. Ellicott, during her life. Chamberlin agreed with Mrs. Ellicott that he would renounce his right to be an executor for $10,000. She paid part of this sum, and later was sued for the balance. *Held* that the bargain was illegal, because although a person named as executor may renounce if he pleases, yet the courts will not aid him in making merchandise of the confidence placed in him by the testator.

146. Even in a case which involves no such confidential relation as that of a trustee, the courts will not encourage an agreement tending to sacrifice the rights of a third party. If A is going to bid at a sale, and B, who wants to keep prices down, promises A money to stay away from the sale, the promise is not binding. The object of the agreement is to prevent the goods from having a fair chance in the open market. A combination of buyers to purchase for their joint account is usually upheld, but an agreement for the mere object of hindering bids is void, even though it

aims to accomplish this object by a purchase for joint account.

FLETCHER *v.* JOHNSON, 139 Mich. 51 (1905). A bank holding certain stock as collateral decided to offer it at public sale. Fletcher and Johnson, both desiring to obtain the stock, agreed that Fletcher should not bid at the sale, and that Johnson should buy the stock for the benefit of both, it being expressly stated that this was to be done to prevent competition. In a suit by Fletcher to enforce the agreement *held* that it was void.

147. An agreement made to bring about a breach of contract has an illegal object, and is unenforceable. If the illegal agreement is voluntarily carried out, the party who is injured by the consequent breach may recover damages from the persons who have thus wronged him. Moreover, the injured party may obtain an injunction to restrain interference with his contract if he can show that otherwise he will suffer irreparable loss.

MOODY *v.* NEWMARK, 121 Cal. 446 (1898). Robinson sold and delivered wheat to Suman, who paid down part of the purchase money. Suman then pledged the wheat to Newmark for a loan. Later Robinson privately induced Newmark to promise to hold the wheat till Suman should pay the balance of his debt to Robinson. However, when the loan was repaid, Newmark delivered the wheat to Suman. In a suit to recover damages for breach of Newmark's promise to Robinson, *held* that the agreement of Newmark with Robinson not to deliver the wheat to Suman on repayment of the loan was void, it being an agreement not to perform his obligation to Suman. Hence, no damages could be recovered for the breach.

QUESTIONS

1. Explain the difference between bucket-shop transactions and legitimate investments in stocks or grain on margin.
2. What is the law in your own state regarding interest?

3. Lloyd was a candidate for a political office on the Democratic ticket, and had incurred certain legitimate campaign expenses. Jones, believing that Reeve would make a stronger fight, promised to pay Lloyd's campaign expenses, if Lloyd would withdraw in favor of Reeve. This Lloyd did, but Jones broke his promise. Can Lloyd force him to pay?

4. Hart, who has been selling a certain breakfast food throughout the Middle West, disposes of his cereal business to White, agreeing not to sell any cereals for five years in the states where he has been actively engaged. Is this agreement binding?

5. Hoyt is engaged for two years by Cramp. Carr, a competitor of Cramp, promises Hoyt $1,000 if Hoyt will break his agreement with Cramp. Hoyt at once leaves Cramp. Can he recover the money promised by Carr?

CHAPTER VIII

THE SIXTH ELEMENT NECESSARY IN SOME CONTRACTS, SPECIAL FORMALITY

148. The five elements discussed, one by one, in the preceding five chapters are all necessary in every single contract. A few contracts require a sixth element which usually is merely the written form in which such contracts must be expressed. The presence of this additional element, special formality, does not dispense with the necessity of having present the five elements already discussed. The contracts requiring special formality, which are treated in this chapter, relate to real estate, suretyship and guaranty, and some other matters.

149. The statement that certain contracts mentioned below must be " written " does not mean that they must be set forth with pen and ink. Instead of a document written by hand, a typewritten or printed form may be signed by the parties with like effect.

(A) Sales of real estate, and certain other realty contracts

150. The legislatures of the various states have passed acts requiring contracts to sell real estate to be put in writing and signed. As to what constitutes real estate, see Chapter XXXVII.

BRAWDY *v.* BRAWDY, 7 Pa. 157 (1847). John Brawdy verbally agreed to sell certain land to his brother Moses for $900. Moses paid part of the purchase money, and afterwards sued to get the land. *Held* that, while he might recover what money he had paid, he could not compel performance of the unwritten agreement.

151. Contracts for leasing realty are also required to be in writing and signed, where the lease is to remain in force a long time. The length of time specified in the different states varies somewhat, but apart from any legal necessity it is always far wiser to have every lease contract carefully drawn up and signed by all parties.

BACON *v.* PARKER, 137 Mass. 309 (1884). Bacon and Parker agreed verbally that Bacon should buy from a third person a lot adjoining one already owned by Bacon, and should erect a warehouse on the two lots; Parker promising that if this were done he would lease the entire property from Bacon for five years, at a certain rental. Bacon did his part, but Parker refused to take the lease. In a suit by Bacon against Parker, *held* that there could be no recovery, for such agreements must be written. Bacon could not recover even for the cost of building the warehouse.

152. The same practical caution applies to agreements for holding real estate in trust. Some of these agreements must be written and signed, or they will not be binding. But even where this formality is not legally necessary, it is desirable for business reasons.

BROCK *v.* BROCK, 90 Ala. 86 (1890). Brock conveyed certain real estate to his wife. A few years later he sued her to enforce a trust agreement concerning this property, alleging that she had verbally promised, when he conveyed it to her, to convey it back to him upon his giving up habits of dissipation. *Held* that the wife's agreement was unenforceable, not having been made in writing.

(B) Certain sales of personal property

153. In most states contracts to sell goods of more than a certain value must be in writing and signed, unless the buyer accepts some or all of the goods or pays some or all of the purchase money.

ALLARD *v.* GREASERT, 61 N. Y. 1 (1874). Greasert agreed to buy ninety hats from Allard. None of the hats cost more than $3

apiece, but the bargain was for the entire lot at $122.25. Greasert paid nothing down when the agreement was made, and refused to receive the hats when they were brought to his store. Allard sued Greasert. *Held* that since the New York statute requires such sales to be in writing where the amount involved is $50 or more, Allard could not recover.

154. The following table shows the states and territories where this requirement is made, grouped according to the minimum amounts of the sales of goods to which the local statutes apply:

$2,500 or over, Ohio.

$500 or over, Alaska, Arizona, Idaho, Illinois, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah.

$200 or over, California, Montana.

$100 or over, Connecticut, Michigan.

$50 or over, Colorado, Georgia, Indiana, Maryland, Minnesota, Mississippi, New Mexico, New York, Oklahoma, Oregon, South Carolina, Vermont, Washington, Wisconsin, Wyoming. Also the District of Columbia.

$30 or over, Arkansas, Missouri.

Any amount, Florida, Iowa.

(C) Contracts to be performed more than a year after they are made

155. The following states and territories require a contract to be written and signed if the parties have agreed that it is not to be performed within a year after being made:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland,

Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

Nichols *v.* Weaver, 7 Kan. 373 (1871). Ann Nichols sued Michael Weaver for the breach of a verbal promise to marry. The marriage agreement was to be carried out at some remote period of time more than a year after it was made. *Held* that Nichols could not recover, the agreement not being in writing.

(D) Contracts of suretyship and guaranty

156. No person may be held liable on a promise to answer for another's debt or default, unless the agreement, or some memorandum thereof, is in writing, and signed by the party to be charged therewith, or by his authorized agent. In Book Fourth the subject of suretyship and guaranty contracts is more fully treated.

Knox *v.* Nutt, 1 Daly (N. Y.) 213 (1862). Knox, a hatter, employed Nutt as clerk. Nutt told Knox that if any of his friends should buy hats on credit he, Nutt, would be responsible. Nutt accordingly was allowed to sell hats to his friends, which were charged to them, but payment was never made. In a suit by Knox against Nutt, *held* that Knox could not recover, Nutt's promise having been merely verbal.

Brown *v.* Farmers & Merchants National Bank, 88 Tex. 265 (1895). W. O. Brown was a minor to whom the bank advanced money on his note. E. Y. Brown verbally promised the bank to pay this debt. The bank sued E. Y. Brown, to enforce his promise, but he relied on the statute requiring a writing in such cases. The bank contended that the promise of W. O. Brown was void because of his minority, and hence that E. Y. Brown's promise was not a promise to answer for another's debt. *Held* that the promise of the minor was not void but only voidable; and that

therefore E. Y. Brown's promise was unenforceable, not being in writing. See Section 89.

157. This requirement does not apply to cases where the party who is sought to be held on a verbal promise has agreed to pay what is really his own debt. Thus, if you order goods to be sent to another, but charged to your account, your promise to pay need not be in writing. But see Section 153. You do not agree to answer for another, since you become the principal debtor yourself. Again, where a promise to pay another's debt is taken in substitution for the obligation previously owed by the other, and the latter is relieved from all liability, the man who agrees to substitute himself for the former debtor becomes the principal and the sole debtor, and his unwritten promise binds him.

Crawford *v.* Edison, 45 Ohio 239 (1887). Smith agreed to build a house for Crawford for $4,250. Smith employed Edison to roof the building for which Smith was to pay $155 on the completion of the job. When Edison had put on about two thirds of the roof, Smith dropped everything and left the county. Edison notified Crawford that he would not go on with the work unless Crawford should agree to pay him. Crawford then verbally promised to pay Edison $155 on completion. In a suit by Edison against Crawford, for breach of this promise, *held* that Edison could recover. The statutory provision, that an agreement to answer for another's debt must be in writing, did not apply to the case, because Crawford's promise was made with the object of promoting his own interest, and not that of Smith.

158. In some states an agreement to answer for another's debt or default need not be in writing where the amount involved is less than $20, or some other small sum, for the different states are at variance in this respect. It is wiser, however, to have all such contracts fully written out, and signed by the surety or guarantor.

(E) Certain miscellaneous contracts

159. Apart from the contracts already treated in this chapter, the local statutes of almost every state require the element, special formality, in some other kinds of agreements. In many states certain corporations, especially municipal corporations, cannot validly enter into some agreements except by complying with prescribed formality. Likewise, many agreements involving the executive, legislative, and judicial branches of government in some of the states must be made in accordance with established procedure.

Times Publishing Co. *v.* Weatherby, 139 Cal. 618 (1903). The charter of the City of Eureka, California, provided that the city should not be "bound by any contract or in any way liable thereon, unless the same is made in writing by order of the council, and the draft thereof approved by the city attorney and the council, and the same ordered to be and be signed by the mayor." The Times Publishing Company, upon the order of council (no formal agreement having been drawn up or approved by the city attorney) did printing for Eureka, for the price of which the council ordered a warrant drawn upon the city treasurer, Weatherby. The warrant was drawn up and signed by the mayor. Weatherby refused payment upon the ground that no valid contract had been entered into as required by the Eureka charter. *Held* that plaintiff could not recover, there being no written contract drawn up in accordance with the charter.

QUESTIONS

1. What is the sixth element required in some contracts? Does the presence of this element dispense with the necessity of having the other five?

2. Gobseck verbally agreed to sell a house and lot to Chabert. Can Chabert force Gobseck to convey the house and lot to him upon tender of the purchase money?

3. Edwards verbally promised Taylor that if the latter would put an elevator in a building which he had for rent, he, Edwards, would rent it for five years at an annual rent of $5,000. Taylor, relying on this promise, put the elevator in the building but Edwards refused to live up to his agreement. What rights if any has Taylor against Edwards?

4. What rule applies to contracts for holding real estate in trust? Need contracts for the sale of goods above a certain value be in writing? State the minimum amount to which this requirement applies in your state.

5. What is the law in your state regarding contracts that are not to be performed within one year from the making thereof?

6. Need a contract of suretyship or guaranty be in writing?

7. In what other kinds of contracts is the element "special formality" sometimes required?

THE OPERATION OF CONTRACTS

CHAPTER IX

A CONTRACT WHEN FORMED USUALLY AFFECTS THE OBLIGATIONS AND RIGHTS OF NOBODY BUT THOSE WHO ARE PARTIES TO IT

160. In the first part of this book we have seen how a contract is formed, and now we must ask about its operation. The effect of a contract is to create legal rights and corresponding obligations. In this second part, we shall see who may exercise contractual rights after they have been created, and against whom contractual obligations may be enforced.

161. A contract is essentially a voluntary agreement. A third person, therefore, who has not assented to it, is not bound by it (unless his agent has made it, which is the same as if he made it himself). A and B have no legal power to make a private agreement which will cast a contractual liability on C's shoulders.

Texas and Pacific Railway Co. *v.* Watson, 190 U. S. 287 (1902). Watson under an agreement between him and O'Neil, stored cotton upon a platform which was near the railway company's depot. The platform had been leased from the railway company by O'Neil, but Watson was not in any way a party to the lease, nor was he aware of its provisions. The cotton caught fire from sparks dropped by the company's locomotive, and was burned.

Watson sued the company. *Held* that the company could not, as a defense to Watson's suit, shield itself behind the stipulations and exemptions from liability for loss caused by fire contained in its lease to O'Neil, for Watson was not bound by that lease.

162. Again, as a rule only the parties who join in making a contract acquire any legal rights under it. A contract may involve a promise to pay money or render services to some outsider, but the promise, not being made to the outsider, usually gives him no rights. Except in certain cases mentioned hereafter, only those parties to the contract to whom the promise was directly made can enforce it. See Section 163.

Morgan Engineering Co. *v.* McKee, 155 Pa. 51 (1893). John Henry, who owned certain electrical patents, made a contract with McKee, by which Henry gave McKee an option to purchase the patents, and McKee agreed to furnish money to construct four sample motors and one dynamo. The motors and dynamo were ordered from an engineering company by Henry, and charged to his account. Henry failed to pay, and the company sued McKee to recover the price of the machines. *Held* that the company could not recover from McKee, it not having been a party to the contract between him and Henry, and the contract not having been made for the company's benefit.

163. Where a contract is made in order to benefit some outsider, he is usually allowed to bring suit upon it. Thus, if two parties enter into a contract whereby one transfers to the other certain property to be held for a third person, this third person may ordinarily enforce the contract. But if the benefit to be derived by the third person is only incidental, and was not the real object in making the agreement, the third person has no rights thereunder and no legal standing to enforce the agreement.

Arnold *v.* Nichols, 64 N. Y. 117 (1876). Hinman loaned Bowen $2,000 to be used in Bowen's business. A few months

later Bowen went into partnership with Nichols, and transferred his business to the firm, the firm agreeing to pay certain specified debts of Bowen, among which was that due Hinman. After Hinman's death his executor, Arnold, sued the firm. *Held* that the firm was liable. Its promise must be regarded as having been made for the benefit of Bowen's creditors, because the assets transferred to the firm were those to which Bowen's creditors had a right to look for payment.

QUESTIONS

1. Gartling and Drake agree that the latter shall purchase Boyle's library for $1,000. Is Boyle bound by the agreement?

2. In the above mentioned case could Boyle compel Drake to pay $1,000 for the library upon offering to deliver it to him?

3. What rights does a third party acquire when a contract is made for his benefit?

CHAPTER X

AFTER THE FORMATION OF A CONTRACT, RIGHTS AND OBLIGATIONS CREATED BY IT MAY SOMETIMES BE PASSED TO OUTSIDERS BY SUBSEQUENT AGREEMENT OR BY OPERATION OF LAW

(A) Transfer by subsequent agreement

164. If, after a contract has been made between A and B, both parties agree with X, an outsider, that A's rights and obligations arising under the contract shall be transferred to X, and that A shall entirely drop out of the matter, this agreement is usually valid. It is called a novation. See Section 71.

FOSTER *v.* PAINE, FISK *et al.* 63 Ia. 85 (1884). Fisk owed Foster $1,300, which was secured by a mortgage on Fisk's farm. Draper purchased the farm from Fisk, and became indebted to Fisk for $1,300. It was agreed among all the parties that Draper should become responsible to Foster for the payment of $1,300, and that Foster should accept him as his debtor instead of Fisk. In pursuance of this agreement, Draper gave his note to Foster, who thereafter received payments from Draper. In a suit by Foster against Fisk and others, growing out of the transaction, *held* that Fisk was no longer liable in the matter.

165. An outsider cannot be forced to accept rights or obligations arising under a contract against his will.

166. Let us ask next, how far one of the original parties to a contract may, without the consent of the other original parties, transfer his rights or obligations to an outsider who is willing to assume them. In the absence of an understanding to the contrary, such transfer is permis-

sible in most contracts, unless the nature of the transaction forbids it. Of course, a transfer leaves the contract practically as it was before, so far as non-assenting parties are concerned. Thus, if A and B make a contract, whereby A is to do something for B, A can never release himself from personal liability to B, merely by getting C's promise to assume the liability. If C duly fulfills A's part of the contract, A is relieved from further liability under it. But unless C actually fulfills this liability, A cannot excuse nonperformance by explaining to B that he relied on C's keeping his promise.

Rice *v.* Gibbs, 33 Neb. 460 (1891). Gibbs gave Archibald a five-months' option on certain real estate belonging to Gibbs. Archibald, without having exercised his option rights, assigned them to Rice. Rice notified Gibbs within the five months that he would take the property in accordance with the agreement between Gibbs and Archibald. Gibbs refused to recognize Rice, who then sued him. *Held* that the contract was assignable, and that Gibbs must convey to Rice, upon the latter's payment of the purchase money.

167. A contractual right to receive the payment of money, or the title to real estate or personalty, is usually assignable without the consent of the party who is to pay the money, or to transfer the title to the property in question. Had the contract been carried out as first intended, the original party who was to get the money or other property could at once have turned it over to any outsider. There is usually no reason, then, to forbid his anticipating the performance of the contract by assigning his contractual right to receive the money or other property.

Tripp *v.* Brownell, 66 Mass. 376 (1853). Tripp, a seaman, assigned to Seabury his share of the profits in a contemplated whaling voyage, which he was to get in lieu of wages. The assignment was given as security for advances made or to be made by Seabury in Tripp's absence. Notice of the assignment was given to the owners of the whaling vessel. In a suit by Tripp against

the owners, *held* that he could not recover his share of the profits, because the above assignment was good, and bound the owners, who were given timely notice thereof, to pay Seabury.

Spare *v.* Home Mutual Ins. Co., 17 Fed. 568 (1883). Ben Lurch insured his warehouse in the Home Mutual Company. After a loss occurred, Lurch assigned the policy to Spare, who thereupon sued the company for the amount of the loss. The defense was that the policy could not be assigned. *Held* that, although before a loss occurred the contract was personal and not assignable without the company's consent, yet after a loss the liability of the insurer was fixed, and the rights of the insured were assignable. See Section 746.

168. It appears from Section 166 that if A is bound by contract to do something for B, A cannot relieve himself from ultimate liability to B merely by getting C to undertake his liability. Hence, if C fails in this undertaking, B may look to A. Now, assuming that C is willing and able to perform A's part of the contract, let us ask if A may, against B's wishes, turn over the work to C instead of doing it himself. If the contract between A and B does not contemplate personal performance by A, he may ordinarily substitute C, if C can fully perform A's part of the contract.

169. But if it appears that A's personal workmanship, skill, taste, or judgment was intended to figure in the carrying out of the contract, A cannot substitute C without B's consent. Likewise, if the performance of the contract is to bring A and B into close personal association. Where a doubt may exist as to the assignability of a certain contractual right, the parties should definitely settle this point when first entering into the contract.

Boston Ice Co. *v.* Potter, 123 Mass. 28 (1877). Potter took ice from the Boston Ice Company in 1873, but being dissatisfied with the manner of delivery, he made a contract for his supply during 1874 with the Citizens' Ice Company. The Boston Ice Company after-

wards bought out the business of the Citizens' Company, the latter company agreeing to transfer its contracts with customers, including Potter. Thereafter the Boston Company supplied Potter with ice without notifying him that it had bought out the Citizens' Company, until after the delivery and consumption of the ice. Potter supposed that he was receiving the ice from the Citizens' Company. In a suit by the Boston Company against Potter, *held* that the plaintiff could not recover for ice furnished in 1874. It had no contract either express or implied with Potter, and he was not bound to consent to the assignment of his contract with the Citizens' Company, for he had previously shown his unwillingness to take ice from the Boston Ice Company.

Litka *v.* Wilcox, 39 Mich. 94 (1878). Kruger owned a farm of forty acres, and agreed to let Wilcox work it on shares for one year. The parties were to work together, and the agreement provided that the wife of Wilcox was to cook and wash for Kruger. The arrangement began and continued for about two months, after which Mrs. Wilcox left and went away with her family. Wilcox then undertook to assign his rights under the contract to his father, whose wife was willing to cook and wash for Kruger. Kruger did not agree to the assignment, but sold the farm to Litka. In a suit by Litka against the elder Wilcox, to prevent the cutting of timber, *held* that the contract was not assignable because it contemplated personal association and personal service.

170. If a person assigns his future wages at a time when he is neither actually employed nor engaged for employment, the agreement is altogether too vague to be sustained as a valid assignment. An assignment of future wages in payment of a debt is valid if the wage earner is employed or is about to be employed by any specific person, and if he directs this person to turn over his future wages to his creditor. But the assignment of salary to be earned by public officials is seldom allowed, since the courts do not want to mar the dignity of public service or to expose such officials to the temptations which might follow the loss of their income.

ST. JOHNS *v.* CHARLES, 105 Mass., 262 (1870), St. Johns made a contract with Charles to cut the brush on the latter's land for $100 in money and all the loose wood on the land. After St. Johns had begun the work, but before he had finished it, he gave Asa Taft, for a valuable consideration, the following order on Charles: "Please pay Asa Taft, on order, all the money that belongs to me for cutting brush for you." Notice of the order was given to Charles. After full performance by St. Johns, Charles settled with him instead of with Taft. Taft sued Charles for $100. *Held*, that Taft could recover, because St. Johns had assigned to him all the money to be earned by St. Johns under the existing contract with Charles.

(B) Transfer by operation of law

171. When one dies, a person is usually appointed to take charge of one's estate, if there is anything for distribution. In Chapter XVII we shall see that the death of a party to a contract does not always terminate it. In many cases the executor or the administrator of a decedent's estate is called upon to complete contracts which the decedent failed to perform fully in his lifetime. Again, where the decedent has finished what he was bound to do under the contract, and the other party owes him money, the executor or the administrator succeeds to the decedent's right to collect this money. No assignment need be made or intended by the decedent, for even though he leaves no will an administrator can be appointed to whom, by the operation of the law concerning these matters, the decedent's rights are transferred. The subject of decedents' estates is treated in Book Fifth.

CLEGG v. BAUMBERGER, ADM'R., 110 Ind. 536 (1886). Jacob Baumberger placed a note for collection in the hands of Clegg, a lawyer. After Baumberger's death, Clegg collected the note but refused to pay the proceeds over to Baumberger's administrator. In a suit by the administrator against Clegg, *held*, the decedent's rights had passed to his administrator, who was entitled to recover.

172. Again, where a man is forced into bankruptcy, he may not wish to recognize the trustee appointed for the benefit of his creditors. Nevertheless, this trustee, who succeeds by operation of law to most of the bankrupt's contractual rights, may bring suit on many kinds of contracts, although the trustee was probably not one of the original parties to any of these contracts, and although the bankrupt will not execute an assignment of his rights under them to the trustee. The subject of bankruptcy will be considered at length in Chapter XVIII.

SANGER *v.* UPTON, 91 U. S. 56 (1875). The Great Western Insurance Co. was adjudged a bankrupt, and Upton was appointed its assignee in bankruptcy. The Federal Court made an order that the balance of unpaid subscriptions to the company's stock should be paid. Sanger having failed to pay, suit was brought against him by Upton. *Held* that the assignee succeeded to all the rights of the bankrupt corporation, and therefore the suit was sustainable. Judgment was entered against Sanger.

173. Sometimes the sale of real estate transfers to the buyer a number of contractual rights which are appurtenant to the real estate itself. Suppose that all the owners along a certain newly opened street agree that every house to be built on that street must have a clear space of twenty feet in front. If this restriction appears on the records in the office of the recorder of deeds, it will bind not only the lot owners who agree to it, but also those who purchase lots from them. Such building restrictions affect the title to the lots. Suppose that two of the owners sell their lots, one selling to A, while the other sells the adjoining lot to B. If B starts to build a house right up to the front line of his lot, A may have him stopped by an injunction. Neither was a party to the original contract, but the contracting parties mutually affected the title to their respective lots, so that nobody could buy a lot free from the

building restriction. Since the restriction as to B's lot was intended for the general enhancement of the value of property along the street, A may enforce that restriction as the owner of the neighboring lot. The restrictions are made for the reciprocal advantage of the lots themselves, whoever may be the owners. Such agreements which affect the land itself rather than the persons who originally made them, are said to "run with the land."

SUTTON *v.* HEAD, 86 Ky. 156 (1887). Head sold land to Sutton, the deed providing that "no intoxicating liquors are to be sold on said premises in less quantities than five gallons." Head lived near by, and inserted the restriction for this reason, and also because the lot had been conveyed to him with a like restriction. Sutton built a house on the land and rented it to Blair for saloon purposes. Blair began to sell liquors in less quantities than five gallons. In a suit by Head against Sutton and Blair, to restrain such use of the property, *held* that the covenant ran with the land, and was therefore effective against the tenant Blair, as well as against Sutton.

QUESTIONS

1. What is a novation? Illustrate.

2. How far may one of the parties to a contract, without the other's consent, transfer his rights or obligations thereunder to a third party?

3. Devlin has a contract with the city of Baynton to clean the streets during the year 1909. May Devlin without the city's consent assign to Sewell his right to receive the money which will become due under the contract?

4. In the above-mentioned case may Devlin transfer to Blackburn the street-cleaning contract without the consent of the city of Baynton?

5. What is the rule with regard to the assignment of wages to be earned in the future when the assignor is neither actually employed nor engaged for employment?

6. What is meant by transfer by operation of law?

7. What rights does an executor or administrator acquire in contracts of his decedent? What rights does a trustee in bankruptcy acquire in the contracts of the bankrupt?

8. Cunningham purchased land from Hallowell. The deed provided that no livery stable, carpenter shop, bone-boiling establishment or other offensive use of the premises should ever be permitted. Cunningham sells the land to Barclay, Barclay's deed containing the same provision as Cunningham's. Barclay proceeds to build a livery stable on the land. May his neighbors, whose deeds contain the same restrictions as Barclay's prevent his use of the premises in this manner? State the reason for your answer.

CHAPTER XI

NEGOTIABLE CONTRACTS

(A) The transfer of nonnegotiable contractual rights

174. As a general rule, any person to whom rights under a contract are assigned stands in no better position to enforce them than the person who assigned them occupied himself. The stream does not rise higher than its source, and the interest in a contract which a purchaser acquires is usually of the same value, and subject to the same defects, as if it had remained in the possession of the original party who sold it.

REYNOLDS *v.* MARTIN, 51 Ia. 324 (1879). Charles Foulk had a claim amounting to $18.95 against Colwell Martin for sawing lumber. Foulk assigned the claim to Nathan Reynolds. When Reynolds demanded payment, Martin refused, because he had bought from H. K. Davis a claim amounting to $20.64 against Foulk, which he wanted to set off against the claim Reynolds had bought from Foulk. *Held* that the set-off was allowable, and Reynolds could not recover. If Foulk had sued, Martin could have set off the claim purchased from Davis, and Reynolds acquired no higher rights than his assignor, Foulk, possessed.

175. If B owes A money, the debt appearing in a book-account or a non-negotiable bond or note, and A assigns his claim to C, C should obtain from B a statement that B admits A's claim to be just. This signed statement is called a declaration of no set-off. It may read as follows:

SACRAMENTO, CAL., September 30, 1909.

I, Benedict Brooke, hereby admit that I owe Arthur Allen $500 *for goods sold and delivered by him to me, and that I have no defense to or set-off against this claim, which Arthur Allen is about to assign to Clara Casey.*

[*Signed*] BENEDICT BROOKE.

Witnesses:

[*Signed*] AUGUSTINE SOLIMEO.

[*Signed*] JAMES CASEY.

176. Moreover, an assignee's rights may sometimes be impaired even after the assignment by arrangements between the party who assigned to him and other parties to the contract if the latter have not yet learned of the assignment. Suppose A has a claim for $100 against B, which C buys without getting from B a declaration of no set-off. Suppose that it was a perfectly valid claim at the time C bought it, but A hurries off to B, after C pays him for the claim, and induces B to settle with him. C has no right to collect a second time from B, for B did not know of the assignment when he paid A. Even if he paid A before the debt was due, C cannot blame him, for he had no reason to suspect that C was interested in the claim. Hence the importance that the assignee of a claim should get a declaration of no set-off, or should at least immediately notify the person against whom the claim is made that it has been assigned.

HEERMANS *v.* ELLSWORTH, 64 N. Y. 159 (1876). Joseph Fellows had lent money to S. Stuart Ellsworth. He transferred his claim to John Heermans. When Heermans sued Ellsworth on the claim the latter proved that he had paid Fellows the amount due before Heermans had notified him of the assignment. *Held* that this was a good defense. Fellows being the creditor, it was to be presumed that he was entitled to payment. It was Heermans's duty to notify Ellsworth of the assignment. His failure to

do so and Ellsworth's subsequent payment to Fellows gave Ellsworth a complete defense.

(B) The transfer of negotiable contractual rights

177. There is a large class of written contracts to which the foregoing remarks do not apply. In the case of negotiable instruments, a declaration of no set-off or prompt notification of the assignment is usually unnecessary, for the assignee is ordinarily protected by the nature of the contract from defenses arising before or after the assignment, provided he holds the written document itself. A negotiable document stands for its face value.

Massachusetts National Bank *v.* Snow, 187 Mass. 159 (1905). H. W. Stevens made a promissory note to the order of Charles H. Snow, who indorsed it in blank (thus making it payable to bearer) and put it away in his desk for safekeeping. Stevens stole the note from Snow's desk and had it discounted by the Massachusetts National Bank. The bank sued Snow on the note. *Held* that the bank was entitled to recover. There was nothing to give the bank notice of any defect in Stevens's title. The bank was a holder in due course and, since the note was payable to bearer acquired a good title from the thief.

178. We have seen that some contracts are not assignable at all. Of those which are assignable some are negotiable, and the others nonnegotiable. A negotiable contract is assignable in a remarkable degree, for it may circulate in the business world almost like currency, and free from many defenses to which a nonnegotiable contract would be subject.

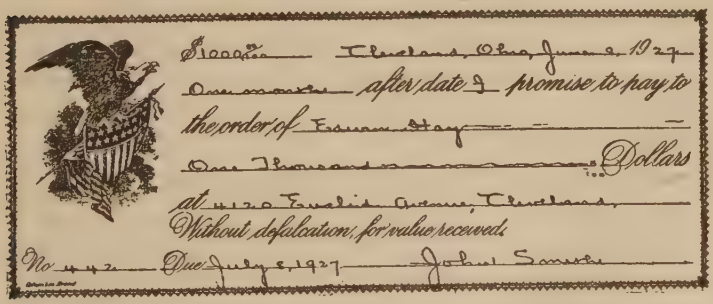
McNamara *v.* Hose, 28 Wash. 461 (1902). McNamara, in good faith, purchased of James Daly, the payee, a negotiable promissory note, before maturity, for one-half its face value. When sued on the note Hose, the maker, showed that he gave the note to Daly as part payment for a lot to which Daly had no title, but to which he fraud-

ulently represented he had title as an inducement to Hose to purchase it. *Held* that while this would be a good defense against the payee, Daly, it would not avail against McNamara, who bought the note in good faith and without notice of any infirmity in Daly's title. McNamara, therefore, could collect the face value of the note from Hose.

179. Promissory notes and bills of exchange are more thoroughly negotiable than most other documents. However, certain corporate bonds are quite negotiable, and many stock certificates with accompanying powers of attorney, warehouse receipts, bills of lading, and other instruments are negotiable in a limited degree. We shall treat these various documents in the order named.

(C) Promissory notes and bills of exchange in general

180. We shall consider only negotiable promissory notes and bills of exchange. The following is a familiar form of promissory note:


Cleveland, Ohio, June 2, 1927
One month after date I promise to pay to
the order of Edwin Hay
One Thousand
Dollars
at 1120 Euclid Avenue, Cleveland,
Without defalcation, for value received.
No 442
Due July 2, 1927
John Smith

The words "Without defalcation. Value received" are not necessary, but they are usually inserted. They mean that the maker has no set-off, and that he has received consideration. John Smith is called the maker of this note, and Edwin Hay is called the payee.

181. Suppose that John Smith never received the amount of the note, or the least consideration for signing

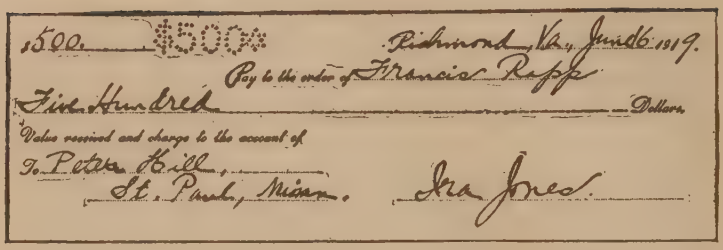
his name to it. He would be called an "accommodation" maker. Suppose he signed the note for the accommodation of Hay, who takes it to a bank and gets it discounted. Even if the bank cashier knew that Smith received no consideration, the bank could hold Smith liable on the note. If Hay himself sued Smith on the note, the defense of no consideration would prevent Hay from winning. The bank, however, having paid Hay for the note, is called a holder for value, and is not prevented from enforcing it against Smith by knowledge that he received nothing for making it. The same rule applies to an accommodation indorser as well as to any other party who signs a promissory note or bill of exchange for a friend's accommodation.

BANKERS' IOWA STATE BANK *v.* MASON HAND LATHE CO. *et al.*, 90 N. W. (Ia.) 612 (1902). The Mason Hand Lathe Company, being indebted to the bank, delivered its note for $3,000 to the bank. Without consideration, W. E. Mason indorsed the note for the accommodation of the Mason Company. When the note was dishonored the bank sued W. E. Mason. *Held* that it could recover. Want of consideration is not a defense to a suit on a note by a holder in due course against an accommodation indorser. Even though the bank acquired the note with knowledge that W. E. Mason was merely an accommodation indorser, it could force Mason to pay, because it was a holder for value.

182. Now suppose that Hay gave Smith consideration for signing the note, but that Smith paid Hay the sum of $1,000, its face value, before the note fell due. Smith should not pay the note at any time without receiving it back; but suppose that he foolishly paid $1,000 to Hay without getting the note. If Hay, after obtaining the money from Smith, took the note to the bank, and the bank cashier discounted it with knowledge that Smith had already paid it, the bank could not recover against Smith. Its knowledge of the payment would destroy its right to recover. If, however, the bank officers were ignorant when the note was

discounted, of the fact that Smith had already paid it, the bank could hold Smith liable, because the note called for the payment of $1,000, and the bank was not bound to ask Smith whether or not he had any defense to make against it. In the case mentioned, the bank would combine the following three elements generally necessary as a protection against defenses to negotiable instruments: *First,* it was a holder in good faith, for it did not know that Smith had already paid off the note. *Second,* it was a holder for value, for it had discounted the note. Sometimes a man who has a note against which there is a good defense (as where the maker was defrauded into signing it) will get a bank to sue on it, merely in order to prevent the defense from being legally available as against the bank. The question then arises as to whether the bank is a holder for value, or is merely suing as the agent for the real owner, against whom the defense would be available. If the bank has discounted the note or allowed the former owner of it to draw checks against his deposit in the bank to the amount of the note, on the strength of his transferring it to the bank, the bank is a holder for value. On the contrary, if the bank is merely an agent for collection, the defense which would have been good as against the former holder is equally good against his agent, the bank. *Third,* it was a holder in due course of business before maturity. Promissory notes, when overdue, are no longer negotiable, and if they are assigned subsequently, the assignee takes them subject to the same defenses that could have been made against the party who assigned them. As to bills of exchange, see Section 213.

183. The following specimen bill of exchange or draft will illustrate the most important features of various kinds of negotiable orders to pay money, which are drawn by one person upon another, and usually in favor of a third person:


$500. 50/100 Richmond, Va., June 6, 1919.
Pay to the order of Francis Rapp
Five Hundred Dollars
Value received and charge to the account of
J. Peter Hill,
St. Paul, Minn.
Ira Jones

Ira Jones, who orders Hill to pay Rapp, is called the "drawer," because he draws on Hill. Rapp, in whose favor the draft is made, is called the "payee," for payment is to be made to him, or to anybody else to whom he may negotiate the draft. Hill, against whom the draft is made, is called the "drawee."

184. Many persons use the word "draft" as synonymous with "bill of exchange," but "draft" has a wider meaning. It covers not only bills of exchange, which are almost always negotiable, but also a great variety of non-negotiable orders to pay money. For instance, many kinds of orders for transferring funds from one department of a corporation to another may be called "drafts," but not "bills of exchange." In the case of a check, which is one kind of draft, a bank or trust company is usually the drawee, while the depositor who signs the check is the drawer, and the man to whose order the check is made payable is the payee. Almost all checks are negotiable.

(D) Requirements of promissory notes and bills of exchange

185. A promissory note or bill of exchange to be negotiable must conform to the following requirements:

1. It must be in writing, and signed by the maker or drawer.

2. It must contain an unconditional promise or order to pay a sum certain, in money.

3. It must be payable on demand or at a fixed or determinable future time.

4. It must be payable to order or to bearer, and,

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

BYRAM *v.* HUNTER, 36 Me. 217 (1856). The Kennebec Log Driving Company was a corporation. The directors voted "that John P. Hunter be paid two hundred dollars in full for all claims he may have upon the company." Hunter drew a draft upon the company as follows: "Please pay to E. G. Byram or order $200, the same being in compliance with a vote of the company." E. G. Byram indorsed this draft to William H. Byram, who sued on it when the company refused to pay. *Held* that he could recover. The instrument sued on was an absolute and unconditional order to pay money due from the company to Hunter and constituted a good bill of exchange.

186. *What is meant by "unconditional."*—An unqualified order or promise to pay is unconditional, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or,

2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional, for perhaps the fund will not be sufficient, and the general personal credit of the party signing the order or promise is not pledged.

NATIONAL SAVING BANK *v.* CABLE, 73 Conn. 568 (1901). A. J. Burke deposited certain money with the bank and gave John D. Edwards the right to withdraw the money for the purpose of paying bills incurred in building Burke's house. Edwards wrote on Burke's bank book "pay Julius C. Cable or order, $300, or what may be due on my deposit book, No. E., page 632. John D. Ed-

wards." The bank sued to ascertain if this was a valid negotiable instrument. *Held* that the order was conditional and hence not negotiable. It was an order to pay out of a particular fund $300 or what might be due on a specified book. The amount to be paid depended upon the adequacy of the specified fund.

187. *What is meant by a sum certain.*—The sum payable is a sum certain, although it is to be paid:

1. With interest; or,

2. By stated installments; or,

3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due.

Markley *v.* Corey, 108 Mich. 184 (1895). Waldo and Varney contracted with Corey to buy certain personal property for $2,500, and gave him five notes for it. Each note provided that if it were not paid at maturity the others should immediately become due. Corey transferred his interest in the contract to Markley and indorsed the notes over to Markley. The second note was not paid at maturity and Markley sued Waldo and Varney as makers and Corey as indorser. They defended on the ground that the instrument was not a promissory note because of the provision that upon its non-payment the others should fall due. *Held* that Markley could recover as the instrument contained all the requisites of negotiability.

188. *What is meant by "determinable future time."*—An instrument is payable at a determinable future time, which is expressed to be payable:

1. On demand.

2. At a fixed period after date or sight; or,

3. On or before a fixed or determinable future time specified therein; or,

4. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

GILLESPIE *v.* MATHER, 10 Pa. 28 (1848). Suit was brought on the following document: "April 3, 1841.

When in funds from the sales of produce in your hands, pay to the order of Mather, Walton and Hallowell, $801.97, for value received, with interest from date, and charge the same to account of, Your obedient servant,

JOHN R. PROCTOR.

To Gillespie & Jones, Philadelphia."

Held, the draft was not negotiable, for it was contingent on the drawees' being "in funds from the sale of produce."

COOLIDGE *v.* RUGGLES, 15 Mass. 387 (1819). Ruggles signed a note promising to pay to bearer $980 when the ship *Mary* should arrive in port. *Held*, the note was not negotiable on account of the contingency upon which the payment of the money depended. The ship was not certain to arrive in port and therefore the instrument was not payable at a determinable future time.

189. *When payable on demand.*—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or,

2. Where no time for payment is expressed.

Where an instrument is issued, accepted or indorsed, when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

LIGHT *v.* KINGBURY *et al.*, 50 Mo. 331 (1872). Light sued Kingbury as maker and John Brooks as indorser of a promissory note dated January 7, 1869, and payable one day after date. Light alleged that Brooks indorsed the note to him April 19, 1869, and that he (Light) demanded payment of Kingbury July 3, 1869. Kingbury refused payment and Light immediately notified Brooks. *Held* that Light could not recover from Brooks. The indorsement of a negotiable note after maturity is equivalent to the drawing of a new bill of exchange at sight, and the same diligence in making demand and giving notice is required to charge the indorser.

See Section 213. The unexplained delay from April 19th to July 3d, relieved Brooks of his liability as indorser.

190. *When payable to order.*—The instrument is payable to order where it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or,
2. The drawer or maker; or,
3. The drawee; or,
4. Two or more payees, jointly; or,
5. One or some of several payees; or,
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

191. *When payable to bearer.*—The instrument is payable to bearer:

1. When it is expressed to be so payable; or,
2. When it is payable to a person named therein or bearer; or,
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or,
4. When the name of the payee does not purport to be the name of any person; or,
5. When the only or last indorsement is an indorsement in blank.

Willitts *v.* Phœnix Bank, 2 Duer (N. Y.) 121 (1853). A. B. Tripler drew a check on the Phœnix Bank to the order of 1658 and, after the bank had certified it, delivered it to Stephen Willitts. *Held* that the check was a valid negotiable instrument passing by delivery. A draft payable to the order of a fictitious person or to "cash" or "bills payable" or a number is in law payable to bearer, and title to it passes by delivery.

192. *What is not required.*—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or,

2. Does not specify the value given, or that any value has been given therefor; or,

3. Does not specify the place where it is drawn, or the place where it is payable; or,

4. Designates a particular kind of current money in which payment is to be made.

193. *When not negotiable.*—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument, otherwise negotiable, is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument is not paid at maturity; or,

2. Waives the benefit of any law intended for the advantage or protection of the obligor; or,

3. Gives the holder an election to require something to be done in lieu of payment of money.

A typical form of collateral note is shown on page 102.

(E) Negotiation of promissory notes and bills of exchange

194. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.

DANN *v.* NORRIS, 24 Conn. 333 (1856). Norris made his note to the order of Amos Dann payable one day after date. In defense to a suit on the note Norris showed that Dann had agreed to transfer the note to Anthony York and had indorsed his (Dann's)

$1,000.

CLEVELAND, OHIO, July 11, 1927.

Four months after date I promise to pay to the order of the Williamson Trust Company One Thousand Dollars with interest at six per cent, without defalcation, for value received. I have deposited herewith twenty shares of Belmont Construction Co. stock as collateral security for the payment of this or any other liability or liabilities of mine to the Williamson Trust Company due or to become due or that may hereafter be contracted, with the right to substitute or exchange for the same other securities acceptable to the said company: which collateral, as well as any other security herewith added to or substituted for the same, in case of any default or of the nonpayment of any of the liabilities above mentioned at maturity, I authorize and empower the said company to sell, assign, and deliver (either the whole or any part thereof) at any broker's board or at public or private sale at their option at any time or times thereafter without advertisement or notice to me and with the right on the part of the said company to become the purchasers thereof at said sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales so made to pay any or all the said liabilities as said company shall deem proper, holding myself responsible for any deficiency. In case there should be any surplus the same to be returned to the undersigned.

Furthermore, with the right also on the part of the said company from time to time to demand such additional collateral securities as they may deem sufficient; and upon my failure to comply with such demand this obligation shall forthwith become due and payable precisely as if it were matured, and all the foregoing rights to sell and transfer the collateral shall be exercisable at once.

It being further understood and agreed that said company shall have a like lien upon any and all funds, stocks, bonds, notes and other property at any time in their hands belonging to the undersigned as security for this note and also for any other liability or liabilities of the undersigned to said company, which lien shall be enforceable in like manner as is hereinabove provided.

[*Signed*] FRANK NEWBOLD GRESHAM.

Payable at the Williamson Trust Company.

Due November 11, 1927.

name on the note. Hence Norris contended that title to the note had passed to York and that only York was entitled to sue. *Held*, Dann could recover. Where the note is payable to a certain person, the mere writing of his name on the back of the note does not transfer title to the indorsee. The note must be delivered as well as indorsed, or something must be done equivalent to a delivery.

195. *Indorsement.*—The indorsement must be written on the instrument itself, or on a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

196. An indorsement may be either special or in blank, and it may be also restrictive or qualified or conditional. The form on page 104 illustrates various kinds of indorsements which are to be considered as written on the back of the promissory note shown in Section 180.

197. *Special and blank indorsements.*—A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable, and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

198. *Restrictive indorsement.*—An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or,

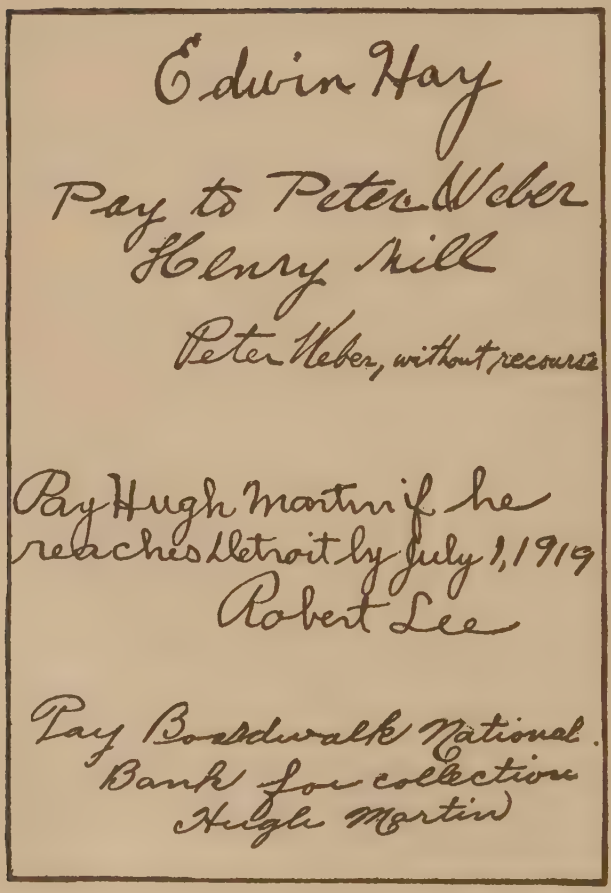
2. Constitutes the indorsee the agent of the indorser; or,

3. Vests the title in the indorsee in trust for, or to the use of, some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

199. *Rights of indorsee.*—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.



An Indorsement in Blank. See Section 197.

A Special Indorsement. See Section 197.

A Qualified Indorsement. See Section 200.

A Conditional Indorsement. See Section 201.

A Restrictive Indorsement. See Section 198

2. To bring any action thereon that the indorser could bring.

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

SMITH *v.* BAYER, 46 Ore. 143 (1905). Bayer delivered his note for $290 to the Concordia Loan & Trust Company. The Concordia Company delivered the note to Milton W. Smith, indorsed as follows: "Pay to the order of Milton W. Smith for collection and return to the Concordia Trust Company. A. D. Rider, Treasurer." The question in this case was whether or not Smith could sue on the note in his own name. *Held*, by indorsing a negotiable note "for collection" or the like, the indorser makes the indorsee his agent with power to sue in the agent's name, reserving to himself the beneficial interest and the right to maintain in his own name appropriate proceedings for his own protection, if advisable.

200. *Qualified indorsement.*—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of like import. Such an indorsement does not impair the negotiable character of the instrument. It is made to lessen the indorser's liability. See Sections 196, 208, and 209.

COWLES *v.* HARTS JOHNSON, *et al.*, 3 Conn. 516 (1821). Cowles & Bidwell, being the payees of a bill of exchange drawn by Harts Johnson & Company, delivered it to Gad Cowles with this indorsement: "Pay Gad Cowles, or order, without recourse to us. (Signed) COWLES & BIDWELL." The bill being dishonored, Gad Cowles sued Cowles and Bidwell on their indorsement. *Held*, he could not recover.

201. *Conditional indorsement.*—Where an indorsement is conditional any person to whom an instrument, so indorsed, is negotiated will hold the same or the proceeds

thereof subject to the rights of the person indorsing conditionally.

202. *Two or more payees or indorsees.*—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the other.

(F) Liabilities of parties to promissory notes and bills of exchange

203. *The maker.*—The maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

204. *The drawer.*—The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that, if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

205. *The acceptor.*—The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and,

2. The existence of the payee and his then capacity to indorse.

National Park Bank *v.* Ninth National Bank, 46 N. Y. 77 (1871). The Ridgley National Bank of Springfield, Illinois, drew its draft on the National Park Bank for $14.20, payable to the order of Eli Shirley, and delivered it to the payee. The amount of this

draft was afterwards fraudulently changed to $6,300 and the name of the payee to E. G. Fanchon. The name of William Ridgley, cashier, signed to the draft, was erased and afterwards rewritten by the party making the erasure. The Lexington National Bank discounted the draft and indorsed it to the Ninth National Bank. The National Park Bank paid the Ninth National Bank the sum of $6,300 on the said draft, but when it discovered the forgery it sued the Ninth National Bank to recover this sum. *Held* that the National Park Bank could not recover. The drawee of a bill of exchange is presumed to know the handwriting of the drawer. If he accepts or pays a bill in the hands of an innocent holder, to which the drawer's name has been forged, he is bound by his act and can neither repudiate the acceptance nor recover back the money.

206. *An indorser.*—A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

207. *When liable as indorser.*—Where a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee, and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

208. *Negotiation.*—Every person negotiating an instrument by delivery or by a qualified indorsement warrants.

1. That the instrument is genuine, and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

LITTAUER *v.* GOLDMAN, 72 N. Y. 506 (1876). Goldman sold and transferred by delivery to Littauer a promissory note. When Littauer attempted to collect from the maker he found that the note was void because given in a usurious transaction. Then he sued Goldman. *Held* that he could not recover. Goldman had not indorsed the note or made any representation as to its legality. Littauer lost because he did not prove that Goldman knew that the note was void for usury. Had he been able to show that Goldman knew of the illegality Littauer would have won his case.

209. *Indorsement without qualification.*—Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and,

2. That the instrument is, at the time of his indorsement, valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that, if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

PRESCOTT NATIONAL BANK *v.* BUTLER, 157 Mass. 548 (1893). Butler indorsed and delivered to the Prescott Bank a promissory

note for $12,500. When the bank sued him as indorser, Butler set up the defense that the note was void because made on Sunday. *Held* that while this was a good defense as between the maker and Butler it would not avail against the bank, because the indorser of a promissory note warrants that the instrument he undertakes to assign is a valid, subsisting and legal contract.

210. *Order of liability.*—As respects one another, indorsers are usually liable in the order in which they indorse, but evidence is admissible to show that as between themselves they have agreed otherwise.

(G) Presentment for payment of promissory notes and bills of exchange

211. *When payable.*—In most states every negotiable instrument is payable at the time fixed therein, without grace. But grace is allowed in Alaska, New Mexico, Oklahoma, South Carolina and South Dakota. Also as to certain bills of exchange in Maine, Massachusetts, North Carolina and South Carolina. When the day of maturity falls on Sunday or a holiday, the instrument is payable the next succeeding business day. Instruments falling due on Saturday are usually to be presented for payment the next succeeding business day, except that instruments payable on demand may be presented, at the holder's option, before noon on Saturday, unless that entire day is a holiday.

212. *Presentment for payment.*—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument, but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

THE FLORENCE OIL & REFINING CO. *v.* FIRST NATIONAL BANK, 38 Col. 119 (1906). In a suit by the bank against the oil company as maker of a promissory note, the defense set up was that the note had not been presented for payment at the bank in Denver where it was made payable. *Held* that the bank was entitled to recover. Presentment for payment was not necessary to charge the oil company, which was primarily liable. The oil company could have offered to prove that it was ready to pay at the specified place, and so saved itself from having to pay interest and costs. But its failure to do this rendered it liable not only for the face value of the note, but for interest and costs besides.

213. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where a note or check is payable on demand, presentment must be made within a reasonable time after its issue, but in the case of bills of exchange (other than checks) presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

TURNER *v.* IRON CHIEF MINING CO., *et al.*, 74 Wis. 355 (1889). On January 10, 1887, the Iron Chief Mining Co. made its note payable to the order of Henry N. Benjamin on demand. Benjamin indorsed the note to Turner on February 15, 1887. Demand for payment was made and refused December 16, 1887. Turner then sued Benjamin on his indorsement. *Held*, a note payable on demand must be presented within a reasonable time after transfer to charge an indorser. The delay of ten months after Benjamin indorsed the note before presentment for payment was unreasonable and discharged the indorser. Turner, therefore, failed to recover.

214. *To be sufficient.*—Presentment for payment to be sufficient must be made:

1. By the holder or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place, as herein defined.

4. To the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

5. The instrument must be exhibited to the person from whom payment is demanded, and if it is paid must be delivered up to the party paying it.

WARING *v.* BETTS, 90 Va. 46 (1893). J. L. Waring made his promissory note payable at the Business Men's Bank of Richmond. The note was not paid at maturity and Betts sued the maker and indorsers. The bank had failed when the note matured, but Betts had presented it to the last manager of the bank at his residence after 5 P.M. The defense was that the presentment was not made at a reasonable time. *Held* that Betts could recover. When the note is payable at a bank it should be presented during business hours. That could not be done in this case because the bank had ceased to exist. Presentment was, therefore, properly made to the last manager of the bank at his residence before the hours of rest.

215. *Proper place.*—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented.

3. Where no place of payment is specified and no address is given, and the instrument is presented at the usual place of business, or residence of the person to make payment.

4. In any other case, if presented to the person to make payment, wherever he can be found, or if presented at his last known place of business or residence.

HOLTZ *v.* BOPPE, 37 N. Y. 634 (1868). Hartman & Ilch made their promissory note in which no place of payment was specified. Boppe indorsed the note. When the note matured, inquiry was made at the last place of business of the makers, but nothing could

be learned of their whereabouts or of their respective residences. In a suit by the holder, Christian Holtz, against the indorser, Boppe, the defense was that the note had not been properly presented. *Held* that Holtz could recover. The rule requiring a demand of payment to be made personally upon the maker at his residence or place of business is satisfied if due and reasonable diligence is used to ascertain such place of business or residence without success; and the note may then be regarded as dishonored by non payment, and notice thereof should be given to the indorser.

216. *In case of death.*—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

217. *Partners.*—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

218. Where there are several persons, not partners, primarily liable on the instrument and no place of payment is specified, presentment must be made to them all.

219. *Presentment dispensed with.*—Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment cannot be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied.

HALE *v.* DANFORTH, 46 Wis. 554 (1879). Finney gave his note indorsed by Danforth to Hale. In a suit by Hale, by way of excusing his failure to demand payment at maturity, he proved that a short time before the note fell due, Danforth promised that if the note were allowed to run he would pay it at any time upon Hale's demand. *Held*, Danforth's promise induced Hale to

omit serving him with the regular notice of non payment and was a waiver of presentment.

220. *Recourse.*—When the instrument is dishonored by nonpayment an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

(H) Notice of the dishonor of promissory notes and bills of exchange

221. *To whom to be given.*—Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Marks *v.* Boone, 24 Fla. 177 (1888). Randolph made his note to the order of Marks who indorsed to Hyer. Hyer indorsed to Boone without recourse. When Boone sued Marks as indorser he could not testify positively whether he had given the latter notice of dishonor on the day following the nonpayment of the note as required by law. *Held* that Boone could not recover. The burden of proving that notice was duly given was on Boone. Because of his failure to show distinctly that notice was given on the proper day he lost his case.

222. *By whom.*—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

Traders National Bank *v.* Jones, 104 N. Y. Div. 433 (1905). The firm of C. F. Beckwith & Co. executed two promissory notes payable to the order of Frank Jones, a member of the firm. The notes were first indorsed by Jones and then by the firm, and were indorsed before delivery to the bank. The notes not being paid at maturity, notice of protest was served upon the firm and with it,

under separate cover, addressed to Jones in care of the firm, was a notice of protest directed to Jones, which the firm was requested to forward to him. The other member of the firm, Beckwith, immediately mailed such notice of protest to Jones at his regular address for receiving mail in the City of New York. The bank sued Jones as indorser. *Held*, as Jones was an accommodation indorser for the firm and hence not liable to it, the firm could not give him valid notice of protest on its own behalf. But the effect of the forwarding of the notice to Jones by Beckwith was to give Jones notice of protest on behalf of the bank. The firm through Beckwith acted as the agent of the bank in forwarding the notice to Jones.

223. *How given.*—A notice may be written or verbal. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby.

224. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.

225. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then

within the time that notice would have been received, in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.

226. *Due notice by mail.*—Where notice of dishonor is duly addressed and deposited in a post office, or in any letter box under the control of the post-office department, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

PIER *v.* HEINRICHSOFFEN, 67 Mo. 163 (1877). Pier sued Heinrichsoffen as indorser of a note which matured July 4, 1861. He deposited it with the Cooperstown Bank for collection. The Cooperstown Bank mailed it to the St. Paul Bank in ample time to reach its destination by the ordinary course of mail before maturity. When the envelope containing the note arrived at St. Paul, the St. Paul Bank had failed and the postmaster returned the envelope unopened to the Cooperstown Bank which immediately mailed it to another agent in St. Paul. This agent presented and protested the note for nonpayment as soon as received, but several days after maturity. *Held* that the holder had used due diligence in making demand for payment. He was not required to provide for a possible but unanticipated failure of the bank before the arrival of the letter, nor for the unauthorized interference with the letter by the postmaster.

227. *Where to be sent.*—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address then the notice of dishonor must be sent as follows:

1. Either to the post office nearest to his place of residence or to the post office where he is accustomed to receive his letters; or,

2. If he live in one place and have his place of business in another, notice may be sent to either place; or,

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party

within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

228. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. If such antecedent parties have already been notified as provided in Section 222, no further notice need be given them.

229. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver, not only of a formal protest, but also of a presentment and notice of dishonor.

First National Bank *v.* Falkenham, 94 Cal. 141 (1892). Falkenham executed his promissory note to the Coronado Beach Company which indorsed and delivered it to the bank, "waiving protest." In a suit by the bank, the defense was that no notice of nonpayment by the maker had been given. *Held* that the bank was entitled to recover. A waiver of protest is equivalent to a waiver of presentment for payment and of notice of nonpayment.

230. *Notice dispensed with.*—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties to be charged.

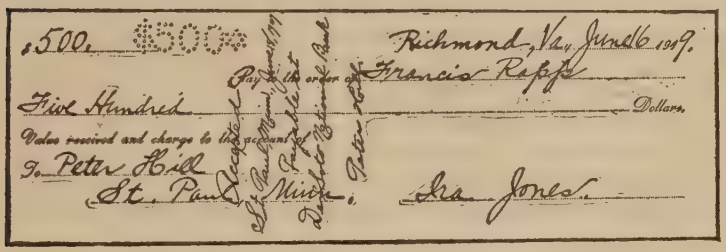
Bacon *v.* Hanna, 137 N. Y. 379 (1893). J. Sawyer Hanna executed his note to the order of A. D. Hanna. It was indorsed by the payee, and also by Morris W. Hanna and W. White Munger. In a suit against Morris W. Hanna as indorser, the question was whether due notice of dishonor had been given to him. It appeared that the notary making protest had previously mailed notices to Morris W. Hanna at his right address, but on this occasion he had looked up the address in the directory. The address therein given was not accurate, but, without taking any steps to verify it, the notary had mailed the notice there. *Held* that due diligence had not been exercised in giving notice of dishonor and so Morris W.

Hanna, who had not received the misdirected notice, was not liable.

(I) Acceptance and protest of bills of exchange

231. *Inland bill—foreign bill.*—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the same state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

232. *Acceptance.*—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing, and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of the money. The following form illustrates the acceptance of the bill of exchange given in Section 183.



233. *Written.*—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill.

234. *General or qualified.*—An acceptance is either general or qualified. A general acceptance assents, without qualification, to the order of the drawer. A qualified

acceptance, in express terms, varies the effect of the bill as drawn.

235. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

MYERS *v.* STANDART, 11 Ohio 29 (1860). Standart drew a bill of exchange to the order of Myers and addressed it to Griffith, Rolfe & Co. The bill was presented for acceptance and on the face of it was written "At Union Bank, Griffith, Rolfe & Co." In a suit by the payee against the drawer, the question was whether the drawer was not discharged by reason of the drawees' having made the bill, which was drawn to them generally at New York, payable at a particular bank in the same city. *Held*, as no injury resulted to the drawer thereby he was not discharged. The drawer had made the bill payable generally at New York. Inasmuch as he contracted to have funds in New York when the bill fell due he was not injured by the acceptor's designation of a particular bank in New York where the bill should be paid.

236. Where a foreign bill, appearing on its face to be such, is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill, which has not previously been dishonored by nonacceptance, is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

237. *The protest.*—The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.

2. The fact that presentment was made, and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

238. *By whom to be made.*—Protest may be made by:

1. A notary public; or,

2. Any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. But where a notary can be obtained, he should be employed rather than anyone else. The notary who makes protest sometimes attends also to notifying the drawer and indorsers. See Section 221.

(J) Certain documents besides promissory notes and bills of exchange are negotiable

239. In certain respects many stock certificates with accompanying assignments, as well as many bills of lading and warehouse receipts and some corporation bonds are negotiable. Such documents are used every year as collateral security for loans aggregating billions of dollars. The more fully negotiable documents are, the safer will be the bank which takes them as collateral. Hence the tendency of the law is to increase their negotiability by making them more and more free from secret defenses when they are in the hands of a bona fide holder for value.

240. A stock certificate by itself is not negotiable. But if X, the registered holder of shares in the Q corporation, sells them and delivers his certificate together with an assignment in blank to the buyer, Y, the certificate with

the assignment may pass through a number of hands without any further registration on the books of the corporation. Anyone who purchases them in good faith may usually rely on statements made by the Q corporation in the certificate (despite defenses which Q might have had as against X) and on statements made by X in the assignment (despite defenses which X might have had as against Y). See Chapter XXVII, subdivisions (B) and (C).

241. Bills of lading are receipts issued by a carrier for goods intrusted to him for transportation. See Chapter XL (D). Warehouse receipts are issued by a warehouseman for goods left in storage with him. If such documents are transferred to a holder for value, who takes them in good faith, he is usually entitled to rely on the statements therein contained. Carriers and warehousemen must, therefore, be specially careful neither to issue receipts except for goods actually delivered to them nor to give up the goods except upon surrender of the outstanding receipts, if the receipts are in negotiable form.

242. When a corporation issues bonds providing for the payment of certain sums of money "to bearer," these bonds are ordinarily negotiable. An innocent purchaser to whom such bonds are delivered may usually hold them free from secret defenses which the corporation that issued them might have urged against former holders thereof. Moreover, if some former holder has been induced by fraud to part with the bonds, he cannot recover them from one who buys them afterwards in ignorance of this fraud.

MEMPHIS BETHEL *v.* BANK, 101 Tenn. 130 (1898). Memphis Bethel, a charitable corporation, owned certain corporate bonds payable to bearer. The treasurer of the corporation pledged the bonds to the Continental Bank as security for a personal loan and executed his note, with the bonds as collateral in the usual form. When the corporation learned of this unauthorized use of the bonds it demanded them back. The bank refused, having sold the bonds

$500 $500

UNITED STATES OF AMERICA

COMMONWEALTH OF PENNSYLVANIA COUNTY OF WEAVER

No. 66

FUNDING BOND OF THE TOWNSHIP OF LOWE

KNOW ALL MEN BY THESE PRESENTS, That the township of *Lowe* in the County of *Weaver*, State of Pennsylvania, is indebted and firmly bound unto William H. Peacock, or bearer, in the sum of Five Hundred Dollars, lawful money of the United States of America, which said sum of money the township of *Lowe* agrees to pay at the *Beaver Trust Company*, in the County of *Weaver*, State of Pennsylvania, on the *first* day of *February, one thousand nine hundred and thirty-nine*, with interest thereon at the rate of four and four-tenths per cent per annum, payable semiannually on the first days of February and August in each and every year, free of state taxes, at the same place on presentation and delivery as they respectively mature of the interest-bearing coupons hereto attached, for which payment of the sum of *Five Hundred Dollars* and the interest thereon as aforesaid well and truly to be made, the faith, credit and corporate funds of the said township are hereby solemnly pledged.

This bond is one of a series of ninety numbered consecutively from one to ninety, both inclusive, each of like amount, date and tenor, issued by the Township of *Lowe* for the purpose of funding a valid floating indebtedness outstanding against the said township and still remaining unpaid and under the authority of the Act of the General Assembly of the Commonwealth of Pennsylvania, approved the 20th day of April, A.D. 1894, entitled "An Act to regulate the manner of increasing the indebtedness of municipalities, to provide for the redemption of the same, and to impose penalties for the illegal increase thereof," and its several amendments and supplements and in accordance with an ordinance duly and regularly passed and enacted into law by the Board of Commissioners of the Township of *Lowe* on the eleventh day of January, one thousand nine hundred and nine; and it is hereby certified that all acts, conditions and things required to be and to be done precedent to or in the issuing of this bond have happened and been done and performed in regular and

due time, manner and form as required by law, and that the total indebtedness of the Township of *Lowe* including the issue to which this bond belongs is not in excess of any statutory or constitutional limit of indebtedness.

In witness whereof the Township of *Lowe* has caused to be affixed hereto its common and corporate seal and the President of the Board of Commissioners and the Clerk thereof have hereunto set their respective hands in testimony thereof this *first* day of *February*, A.D. 1909.

(SEAL OF LOWE TOWNSHIP, WEAVER COUNTY)

(Signed) NESBIT PEALE,
President of Board
of Commissioners.

Attest:
(Signed) HENRY WEST,
Township Clerk.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
FEBRUARY, 1912
at the Beaver Trust Company
in the said Township of Lowe,
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
AUGUST, 1911
at the Beaver Trust Company
in the said Township of Lowe
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
FEBRUARY, 1911
at the Beaver Trust Company
in the said Township of Lowe,
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
AUGUST, 1910
at the Beaver Trust Company
in the said Township of Lowe
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
FEBRUARY, 1910
at the Beaver Trust Company
in the said Township of Lowe
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

THE TOWNSHIP OF LOWE,
County of Weaver, State of Penna.,
will pay to the bearer
the sum of ELEVEN DOLLARS
on the first day of
AUGUST, 1909
at the Beaver Trust Company
in the said Township of Lowe
on surrender of this coupon,
being six months interest
on funding bond No. 66.
(Signed) D. C. HECTOR,
Treasurer.

and applied the proceeds to payment of the note. The corporation then sued the bank for the market value of the bonds. *Held* that it could not recover. The bank received the bonds as collateral with nothing to indicate that the treasurer was not the owner. It was a holder in good faith and was entitled to be protected to the extent of the debt secured by the bonds.

243. Most bonds of the kind mentioned in Section 242 have coupons attached to them for the payment of interest as it falls due quarterly or half yearly. These coupons may be detached from the bonds and are usually negotiable by themselves.

244. On pages 121–122 is a form of negotiable coupon bond issued by a township. See Section 508. After the bond the form shows also a few of the sixty interest coupons attached to the bond. These coupons are usually cut off one by one as they respectively fall due, and presented for payment.

QUESTIONS

1. What rights does the assignee of a contract usually acquire?

2. Fletcher owes Curtis $300 on a book account. Curtis assigns the right to receive the money to Dwyer. Before Dwyer has notified Fletcher of the assignment, Fletcher pays the money to Curtis. Can Dwyer collect again from Fletcher? State the reason for your answer.

3. What is a declaration of no set-off? In what cases of assignment of contract rights is it important to obtain a declaration of no set-off? When is it not required? Why?

4. Can the holder of a promissory note acquire a good title from a thief?

5. Booker is induced by the false representations of Carman to give him a promissory note for $1,000. Is Booker liable to Carman

on the promissory note? Could Grotevent, an innocent purchaser for value from Carman, recover from Booker?

6. State what instruments other than promissory notes and bills of exchange possess the characteristic of negotiability.

7. Give a form of promissory note.

8. Is consideration necessary in a promissory note? Define maker. Payee. Indorser. Accommodation indorser.

9. Is want of consideration a valid defense to an action by the payee on a promissory note against the maker? Would this defense avail against an indorsee of a promissory note in an action against the maker (*a*) if he knew that the maker was an accommodation party? (*b*) if he did not know that the maker was an accommodation party?

10. Smith made his promissory note to the order of Hay. At maturity Smith paid the amount of the note but Hay did not surrender it to Smith. Afterwards Hay had the note discounted by the All-Night Bank. Can the bank recover the amount of the note from Smith (*a*) if it was ignorant of the fact that Smith had already paid Hay? (*b*) if it knew that Smith had already paid Hay? (*c*) what would it be necessary for the bank to show to recover?

11. Draw a specimen form of bill of exchange. Define drawer. Drawee. Payee.

12. What is a draft?

13. State the requirements of a promissory note or bill of exchange.

14. Doyle owed Haig $200. Haig addressed the following instrument to Doyle. "Please pay to John Thompson $200, the amount due me." Thompson indorsed and delivered the note to Elliot. Would you advise Doyle to pay the money to Elliot? If so, why? If not, why not?

15. What is meant by an "unconditional promise or order to pay"?

16. Is the following a negotiable instrument: "I promise to pay A. S. Smith $2,000 out of the proceeds of my 1909 wheat crop?"

17. What is meant by a sum certain?

18. What is meant by a determinable future time?

19. Corey promises in writing, to pay Hare $100 thirty days after Corey's marriage. Is this a valid negotiable instrument?

20. When is an instrument payable on demand? When is it payable to order? When is an instrument payable to bearer?

21. Waldo drew a check on the Rising Sun Bank to the order of "Sundries." Is this a valid negotiable instrument?

22. Need a negotiable instrument be dated? Need it specify the place where it is drawn and where it is payable?

23. When is an instrument not negotiable?

24. Carr addressed the following instrument to Levine. "Dear sir, Please pay to Smucker $200 or deliver to him my white horse Roderick Dhu." Is this a valid negotiable instrument?

25. How is an instrument payable to bearer negotiated?

26. How is an instrument payable to order negotiated?

27. Define indorsement. Special indorsement. Blank indorsement. Restrictive indorsement. Qualified indorsement. Conditional indorsement. Illustrate each.

28. How is an instrument payable to the order of two or more persons who are not partners properly indorsed? What is the acceptor's contract? What does he admit?

29. When is a person liable as an indorser?

30. What does a person negotiating an instrument by delivery or by a qualified indorsement warrant?

31. What does a person indorsing an instrument by an unqualified indorsement warrant?

32. When is a negotiable instrument payable? Are days of grace allowed in your state?

33. When is presentment for payment necessary?

34. When must presentment be made?

35. What are the requirements of a sufficient presentment for payment?

36. What is the rule where persons primarily liable on the instrument are liable as partners and no place of payment is specified? What is the rule where persons primarily liable on the instrument are not partners and no place of payment is specified?

37. When is presentment for payment dispensed with?

38. What right accrues to the holder when a negotiable instrument is dishonored by nonpayment? To whom should notice of dishonor be given? By whom should notice of dishonor be given? Must notice of dishonor be in writing? Within what time must

notice of dishonor be given (*a*) when the person giving and the person receiving notice reside in the same place? (*b*) when they reside in different places?

39. What is the rule with regard to notice duly addressed and deposited in a post office? Where must notice of dishonor be sent when a party has added an address beside his signature?

40. When a party receives notice of dishonor, how long has he after the receipt of such notice to give notice to antecedent parties?

41. What is the contract of the maker of a negotiable instrument?

42. What is the contract of the drawer of a negotiable instrument?

43. Josephs addressed the following instrument to the Standard National Bank: "Pay to the order of Johns $75 and charge the same to my account." Johns presented the instrument at the bank on July 7th and asked the bank to write its acceptance. The bank refused to receive the draft at all. What is the effect of such a refusal?

44. What is a general acceptance? What is a qualified acceptance?

45. May the holder refuse to take a qualified acceptance? What is the effect of a qualified acceptance?

46. Is notice of dishonor of a bill of exchange for nonacceptance necessary? Is such notice necessary in case of nonpayment?

47. What must a protest specify? By whom may it be made?

48. Are stock certificates negotiable? Warehouse receipts? Bonds?

THE PROOF AND THE INTERPRETATION OF CONTRACTS

CHAPTER XII

RULES OF EVIDENCE RELATING TO CONTRACTS

245. We have seen how a contract is formed. We have also seen how it operates as regards the persons on whom it imposes liabilities or confers legal rights. Now we shall consider some rules about the proof of contracts, and some rules about the interpretation of contracts, if they come before the courts. In the present chapter we shall see a few important rules of evidence concerning the proof of contracts in judicial proceedings, and in Chapter XIII we shall consider what construction a judge will place upon contracts in certain cases where a question arises about the intention of the parties.

246. In discussing rules of evidence relating to contracts, we shall confine ourselves to those which are most important for business men to know. The various points to be taken up here may be grouped around the idea that a written contract is usually far better than a verbal one, from the standpoint of practical advantage. In Chapter VIII we saw that a verbal contract is just as binding legally as a written one, except in a few cases. Nevertheless, in the majority of cases, even where no special formality is required, a written contract is preferable to one

that is not written. Some of its advantages may be enumerated as follows: *first*, the fact that it is in writing helps to show that there was a definite agreement between the parties, and not merely an indecisive bargaining which never amounted to a contract; *second*, it prevents perjury; *third*, it prevents the parties from forgetting the terms which they settled upon; *fourth*, the very act of putting an agreement in writing brings to light points which require adjustment, for the careful expression of a contract on paper fixes one's mind on the exact meaning of the words used; *fifth*, it often enables legal redress to be obtained more quickly, for many disputes about verbal contracts involve the long delays incident to trial by jury, while they would be speedily settled by the court if they had been set forth in writing; *sixth*, it is more easily proved before a court.

247. Only the last two reasons for preferring a written contract to a verbal one need any comment. In explanation of the fifth reason, it may be said that if you bring suit to enforce a verbal contract, you may find that the other party differs with you in his recollection of its terms. The dispute of fact thus raised may have to be settled by a jury. This usually involves a delay of months, and sometimes of years. On the other hand, if the contract is fully embodied in writing, probably no such dispute can be raised by the other party. Even though he offers testimony to prove that the writing which he signed does not correctly express the intention of the parties, the courts may refuse to hear it. A rule of evidence forbids a written contract to be contradicted by verbal testimony. There are certain exceptions to this rule, but it is strictly enforced in most cases, even though it sometimes works hardship. A person who can read should not sign a paper without examining its contents. It would in many cases open the door to fraud and perjury for judges to allow a person to

excuse his failure to live up to a written contract on the plea that he was not acquainted with its contents. If you carelessly sign a contract without thoroughly understanding it, you must blame yourself for the consequences.

Wason *v.* Rowe, 16 Vt. 525 (1844). Wason bought a horse of Rowe and received from him a bill of sale in the following words: "Thomas Wason bought of Elijah Rowe one bay horse, five years old last July, considered sound. Price sixty-five dollars. Rec'd payment. (Signed) Elijah Rowe." Wason sued Rowe for breach of warranty and offered evidence to show the horse was unsound. He asked the court to leave to the jury the question whether or not there was a warranty. *Held*, the whole contract of the parties was contained in the bill of sale which did not contain a warranty. Ordinarily written documents must be interpreted by the court and not by the jury. Since the writing contained no warranty, Wason lost his case.

248. The sixth reason for preferring a written contract is that it can be proved in court more easily than a verbal one. Those who make a verbal contract, as well as the bystanders who witness it, may not remember the transaction clearly, or may fall sick, or die, or may live at a great distance from the courthouse where the contract is to be proved. Even though they come to court and are prepared to testify, they may be subjected to interruptions, and may be unnerved by the lawyer for the opposition. Their motives in testifying about the contract may be attacked, especially if they are interested parties. Finally, suppose that the verbal contract has not been made known to any outsider, and that one of the parties is dead or insane. The law forbids the other party to testify about the contract. The death or lunacy of one party seals the other's mouth. As there are no witnesses, the contract cannot be proved at all.

Ewing *v.* White, 8 Utah 250 (1892). In a suit brought by Ewing, the administrator of Collins, on a promissory note, White

offered to prove by his own oral testimony that before maturity he had paid Collins the principal and interest due thereon. *Held*, the evidence was not admissible because Collins was dead. If the maker of a note when sued by the executor or administrator of the payee could defeat a recovery by testifying that he paid the deceased during the latter's lifetime, a premium on perjury, limited only by the amount of the debt, would be held out to him.

249. Not only should important contracts be put in writing, but they should also be made as clear, precise, and complete as possible. Do not take it for granted that a legal phrase which you cannot fully understand is meaningless, for it may prove to be of great importance. Do not accept the other party's explanation of it, but take independent advice. Do not spare pains in providing for all dangerous contingencies that may have any bearing on the contract. If the contract is written, it is wise, though unnecessary, to have one or more trusty persons of good repute sign it as witnesses. If the contract is verbal, it may be well to have it made in the presence of such witnesses and to call their attention to its terms. A contract signed by the parties is equally valid whether its terms are printed or typewritten or set forth with ink or pencil. The use of a pencil is objectionable, however, because most pencil marks can be easily erased.

250. After a contract is signed never alter it, unless all parties consent in writing. A material alteration, even though innocently made, if not assented to by all the parties, usually makes the document worthless as evidence. If the alteration is made fraudulently by one of the parties, it usually nullifies (so far as concerns the rights of this fraudulent party) not only the document but also the contract of which the document was evidence. To avoid the appearance of alteration, draw up a contract without interlineations, erasures, or other suspicious features. If a document containing an interlineation or

erasure must be signed at once, there being no time to prepare a corrected copy, state in the witness clause what words have been interlined or erased.

SCHNEWIND *v.* HACKET, 54 Ind. 248 (1876). Oliver Johnson and Daniel P. Ingraham made their promissory note to the order of Henry Schnewind. In a suit by Schnewind, the defense was that Johnson had, without Ingraham's consent, added a clause to the note fixing the rate of interest at 10 per cent. although there had been no provision for the payment of interest when the note was signed. *Held* that Schnewind could not recover. Hacket, Johnson's administrator, was liable, but the alteration of the note by the addition of the words "with interest at 10 per cent." avoided the instrument so far as Ingraham was concerned.

QUESTIONS

1. State why a written contract is preferable to one that is not written.

2. State some of the practical difficulties in the way of proving a verbal contract in court.

3. Piper authorized Holten, proprietor of the *Manufacturers' Journal*, to insert his advertisement for a certain length of time. The order which Piper signed provided that no verbal agreements would be recognized. Piper refused to pay for the advertisement. Holten sued him. Would Piper be allowed to show as a defense to the action that Holten's solicitor, Giffin, had said that he might cancel the advertisement at any time if it did not bring him a large increase of business?

4. Lewis verbally contracts to supply Mortimer with 100 tons of coal between the first and fifteenth day of every month during the year 1908. Lewis dies and his estate sues Mortimer for the price of the coal sold and delivered. May Mortimer testify as to the price agreed upon between him and Lewis for the coal?

5. What practical precaution should be taken regarding the witnessing of all contracts?

6. When is a contract, in which several interlineations and erasures appear, admissible in evidence?

CHAPTER XIII

RULES FOR THE INTERPRETATION OF CONTRACTS

251. When a contract has been proved in a judicial proceeding, the decision of any controversy between the parties will involve either some disputed question of law or some dispute as to a matter of fact, or both. Usually the judges decide points of law, and leave disputes of fact for the decision of a jury. When the parties contradict each other as to the terms of a verbal agreement, ordinarily the judge who hears the case instructs the jury as to the law, and then the jury, if all the jurors agree, gives a verdict for the plaintiff or the defendant. Where there is no dispute as to the terms of the agreement, the courts try to gather the intention of the parties from the words that were used.

252. Since a contract is essentially an agreement, no judge will enforce it according to the literal meaning of the words used if a close inspection of the contract clearly reveals that the parties had an entirely different understanding of it. But while a judge will not slavishly follow the expressions used by the parties, if to do so would defeat their obvious intention, yet, especially in the case of a written contract, every word is given weight in getting at that intention. The courts dislike to admit verbal testimony to explain a written contract, except as a last resort, for the parties are supposed to have embodied their agreement in the writing.

HEYWOOD *v.* PERRIN, 10 Pick. (Mass.) 228 (1830). Perrin bought goods of Heywood and gave his promissory note in pay-

ment. The following memorandum was written on the bottom of the note: "One half payable in twelve months, the balance in twenty-four months." Between twelve and twenty-four months after the execution of the note Perrin became insolvent. In a suit on the note Heywood offered to prove a conversation between Perrin and himself at the time the memorandum was written wherein it was agreed that Perrin should have credit only if he remained solvent. *Held* that the memorandum was a part of the contract which was to be construed according to all its written terms. Heywood could not show by verbal evidence that the stipulation for a term of credit was provisional on Perrin's remaining solvent. His recovery was, therefore, limited to one half the face of the note, that being the amount due by the terms of the contract when the suit was commenced.

253. In the interpretation of a contract, the plain, simple meaning of words is given to them, unless it appears that they were used in some technical or extraordinary way. Again, the courts consider that the parties probably intended to have a sensible agreement in accordance with law, and any construction which would make it look absurd or illegal will be avoided if fairly possible. Agreements will be interpreted in the light of the circumstances surrounding the parties who made them. Proof of business customs often removes doubt as to what the parties intended.

HAWES *v.* SMITH, 12 Me. 429 (1835). Greenlief C. Neally was arrested at the suit of his creditor, Hawes. Smith agreed in writing in consideration that Hawes would discharge Neally from arrest, to pay Hawes within sixty days, "all such sums of money as may now be due and owing to him," by Neally. In a suit on this agreement Hawes contended that Smith had contracted to pay all that Neally owed on the day of the contract whether it had become due or not. *Held,* in the interpretation of contracts the plain, ordinary, and popular sense of the terms used should prevail. From the situation, circumstances and objects of the parties it is clear that the phraseology, "all such sums of money as may be now due or

owing," was meant to include only such sums as were then payable and for the recovery of which Neally had been arrested.

254. Where there is hopeless contradiction between two clauses in the same contract, which has been made on a printed form, and one of these clauses was printed in the form while the other was written, the latter will prevail. It is reasonable to suppose that the intention of the parties was clearly directed to the written clause, while the printed one may have escaped their notice.

QUESTIONS

1. By whom are questions of law usually decided in judicial proceedings? Questions of fact?
2. How are words usually interpreted?
3. Which will prevail where the written clauses and printed clauses of a contract conflict?

THE DISCHARGE OF CONTRACTS

CHAPTER XIV

DISCHARGE OF CONTRACTS BY AGREEMENT

255. We have seen, first, how a contract is formed; second, upon whom it operates; and third, how it is proved and interpreted. Finally, we ask about the methods in which it may be brought to an end. There are five methods by which a contract may be discharged or terminated. First, it may be discharged in the same way that it was formed, by agreement of the parties. Second, it may be discharged by performance. If all the parties have fully received what they were to get under it, and carried out what they were to do, the contract ceases to bind them, and passes out of existence. Third, it may be discharged by breach. If one party breaks the contract, the other is no longer bound to go ahead with it, but may treat it as discharged, and sue to recover whatever damages he has suffered. Fourth, it may be discharged in a few cases by occurrences which make performance impossible. Fifth, one or more of the parties may obtain a discharge in bankruptcy, which usually involves the discharge of almost all the contracts to which the bankrupt is a party. This chapter deals with the first method of discharging a contract.

256. The parties to a contract are free either to make it or not to make it, but they are bound by it as soon as it

is made. One cannot drop it without the other's consent. There is no reason, however, to forbid the termination of it at any time, provided all the parties are willing. In Section 71 it appears that, before the fulfillment of a contract, the parties may by a second contract change the terms of the first one. Again, instead of substituting a new contract for the old, the parties may agree merely to cancel the old one entirely. If, when the cancellation agreement is made, neither party has completed his part of the contract, the release of one from the obligation to fulfill what he is bound to do is consideration for the release of the other from a similar obligation. If, on the contrary, one party has already completed what he is to do and agrees to forgive the other party without any consideration, this agreement should be under seal, which is usually a substitute for consideration. See Section 61. The agreement to discharge a contract should itself contain the elements necessary for the formation of a perfect contract, including seal or consideration.

257. When a contract provides that it may be set aside upon a certain condition, the fulfillment of this condition will discharge it. For instance, suppose you buy goods at a store which allows its customers to return such goods within ten days. The contract of purchase which you make is subject to the condition subsequent permitting you to set it aside if you exercise your privilege of returning the goods. Many bonds, which are in most cases sealed contracts for the payment of money, are made with a condition subsequent. See Section 641.

WESTERN MUTUAL LIFE ASSOCIATION *v.* ROBINSON, 74 Ill. App. 458 (1897). Robinson's contract of employment with the Western Mutual Life Association, provided that if Robinson should fail to write the amount of $10,000 worth of insurance per month during any three months "the contract should cease and determine and thereafter be null and void." In a suit arising out of this contract

Robinson contended that it was still in force since the association had never given him notice of its termination. *Held*, as Robinson had failed to write insurance to the amount of $10,000 per month for three months prior to June 1, 1896, the contract came to an end by its own terms and no notice of its discharge was required to be given to Robinson by the association.

QUESTIONS

1. Enumerate the methods in which contracts may be discharged.

2. Explain and illustrate the discharge of contracts by agreement of the parties. What elements should an agreement to discharge a contract contain?

3. Discuss and illustrate the discharge of a contract by the operation of a condition subsequent in the original contract itself.

4. McCarthy buys a set of books from Gallagher. The contract provides that McCarthy may return the books at any time within ten days if he does not find them satisfactory. McCarthy returns the books within the time specified. Is the contract discharged?

CHAPTER XV

DISCHARGE OF CONTRACTS BY PERFORMANCE

258. A contract is discharged when all its terms are fulfilled. Such discharge is absolute. But sometimes a discharge is only conditional. Thus, in the case of a sale, the purchaser when asked to pay will, perhaps, offer his own or a third party's promissory note for the amount due, instead of cash. If the note is taken but not paid, the seller may usually sue either on it or on the original claim to cover which it was given. His acceptance of the note is regarded merely as a conditional payment, unless he has agreed to take the note unconditionally, instead of his original claim.

259. Where one party is willing and able to perform what he is to do under the terms of a contract, but the other party refuses to accept performance, ordinarily the former is excused from proceeding further in the matter, and may treat the contract as discharged. If he desires, he may guard against the possibility of future litigation and show clearly that he was not to blame by making a "tender," which is a definite attempt to perform.

260. If a debtor owes, say $1,000, and takes that sum in gold, treasury notes of certain issues, or silver dollars to the creditor, who refuses to accept it, the debtor has done his part. If the creditor sues him afterwards, judgment for $1,000 may be recovered against the debtor, but not for costs of suit or interest for the interval between the tender and the date of judgment. Where tender is to be made, not of money due, but of the performance of some other contractual obligation, the form of tender varies widely with the circumstances of the case. It need not be

made to one who announces that he will not accept it. Thus, if a man has agreed to buy an article, and gives notice after it is manufactured for him that he will not take it, the seller need not tender the article to the buyer, for the buyer's conduct waives tender, and the seller may sue him without this formality.

261. In the course of performing almost every large building or engineering contract, there are some defects in materials or workmanship. If these defects are trifling, and have been caused by no desire on the contractor's part to cheat, the doctrine of substantial performance protects him, and he can recover what is due him under the contract after making allowance for the defects in his work.

CHAMBERS *v.* JAYNES, 4 Pa. 39 (1846). Chambers agreed to build two houses for Jaynes. When he sued for the purchase money, Jaynes defended on the ground that a second coat of paint had not been put on a few doors and shutters, and that there was no glass in one of the cellar windows. These omissions could be supplied for $10. *Held* that where a party has substantially and in good faith complied with his contract, he cannot be deprived of compensation on account of some slight imperfection for which the other party may be recompensed by an allowance of money.

QUESTIONS

1. Define and illustrate the conditional discharge of contracts.
2. Light owes Conroy $100 for professional services. He gives Conroy his check in payment. The check is returned marked, "Insufficient funds." May Conroy sue Light on the check or must he sue him on his original claim for services?
3. Define "tender."
4. Mitchell owes Potter $1,000. Upon the day fixed for payment Mitchell tenders Potter the amount due in bank notes but Potter refuses to accept the same unless payment is made in gold. What if anything can Potter recover from Mitchell in a subsequent suit?
5. Define and illustrate the doctrine of substantial performance.

CHAPTER XVI

DISCHARGE OF CONTRACTS BY BREACH

262. If one party fails to perform, in an essential matter, what he is bound to do under a contract, the other party may treat the contract as broken, and refuse to go ahead with it himself. Not every breach of a contract will discharge it, and a distinction must be drawn between terms which are of vital importance, and those which are merely collateral.

SHEAHAN *v.* BARRY, 27 Mich. 217 (1873). Daniel Sheahan was engaged to Mary Barry, but the date of the wedding had never been fixed. Daniel married another woman. Mary thereupon sued him for breach of promise. *Held*, by marrying the second woman Daniel had put it out of his power to fulfill his engagement with Mary, which gave her an immediate right of action against him for breach of contract.

263. The intention of the parties themselves usually guides the courts in this matter, as in most other matters of contract law. The parties may declare in their agreement that the literal fulfillment of some term, seemingly of scant importance, is an absolute condition of the contract. If they did not give this term the importance of a condition, the courts would hold it only a collateral warranty. A condition is an essential term, the breach of which enables the injured party to treat the contract as ended. A collateral warranty is a nonessential term, the breach of which does not discharge the contract, but merely gives the injured party a right to damages. In

the absence of an express statement from the parties themselves, a judge will be guided by the surrounding circumstances in deciding whether or not a term of a contract is of essential importance.

264. The question as to whether or not a breach of contract is sufficiently important to discharge it, sometimes comes up in a contract which relates to several different matters, or which is to be performed in several installments. If performance is entirely deficient as to part of such a contract, it is often doubtful whether the contract is discharged partially or wholly. If the contract is one entire contract, it is wholly discharged. It is only partially discharged if it is a severable contract. A severable contract is really a number of different contracts.

265. If what is to be performed by you under a contract consists of several distinct items, and the consideration to be furnished by the other party is apportioned to each item of your performance, such a contract is often severable. The mere fact that your performance is split up into different parts, and that the consideration is split up into the same number of parts does not make the contract severable unless each item of consideration is intended to correspond with a certain item of performance. Again, the mere fact that the subject matter of the contract is sold by quantity or weight will not justify the seller in performing only partly, and demanding payment calculated according to the quantity or weight of what he has actually delivered.

Norrington *v.* Wright, 115 U. S. 188 (1885). Wright agreed to buy 5,000 tons of iron rails from Norrington at $45 per ton. The rails were to be shipped at the rate of about 1,000 tons per month beginning February, 1880, but the whole lot was to be shipped before August 1, 1880. Norrington shipped only 400 tons in February and 885 in March. Wright then notified Norrington that the contract was rescinded. Norrington tendered the rest of the

rails which Wright refused to receive. Hence this suit. *Held* that Norrington could not recover. The seller is bound to deliver the quantity stipulated and has no right to compel the buyer to accept a less quantity. When the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity during the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at one time.

266. When the contract fixes a certain time by which performance must be completed, the question is frequently raised whether or not the time clause is binding. In mercantile contracts, if one party delays performance beyond the date agreed upon, the other may generally refuse to accept tardy performance. He may drop the matter and make arrangements elsewhere. If, however, by his words or conduct he gives the delinquent party to understand that he will not insist on prompt performance, he thereby waives the time clause.

267. In most building contracts a time clause is not regarded as vital, unless the building in question is to be erected for a temporary purpose. If an exposition building is to be erected for a fair, it would be absurd for the builder to demand payment should he fail to erect it until the fair is almost over. Instead of receiving money from the other party, the builder would probably have to pay him damages. Even where a building is for permanent use, the builder who fails to complete it on time must compensate the owner for damages caused by the delay. In that case, while the breach does not justify the owner in declaring the entire contract discharged, it will, nevertheless, entitle him to deduct from any payment which he makes to the builder whatever damages he has suffered as a natural result of the delay. If he has paid the builder beforehand, he may sue for the damages.

268. To forestall the trouble of proving exactly what

damages are caused by the delay, the parties sometimes provide in their original agreement that a certain sum shall be paid as liquidated damages by the builder for each day that he may take to complete his work after the time fixed. The phrase "liquidated damages" means that the parties agree to consider the damages as ascertained, without itemized proof as to what they consist of or how they were caused.

269. The courts will not enforce a provision respecting liquidated damages if it seems clearly unreasonable. While contracts are usually enforced in all their terms, yet the judges do not like to permit one who has broken a contract to be unduly punished. It is entirely proper that he should be made to pay damages to the injured party, but when the sum agreed upon is clearly in the nature of a penalty, the situation is different. Where the same figure is agreed upon as liquidated damages in the event of different kinds of breaches, some important and some trifling, it looks as if no proportion were observed between the breach and the damages supposed to flow from it, and the courts are disposed to disregard the entire clause on the ground that it imposes an unreasonable penalty.

270. The party who is injured by the breach of a contract may recover damages from the other. If it is necessary to bring suit to get these damages, it may take months or years before judgment is finally rendered. Even when he gets judgment, he usually finds that it does not include an allowance for what he has paid his lawyer or for the annoyance incident to a lawsuit. It is often better, therefore, especially in building and engineering contracts, to provide that in case of a breach, arbitrators shall be appointed to determine the extent of the damages caused by it. Let one arbitrator be chosen by each party, and if there are only two parties, let the two arbitrators select a third. An

arbitration clause is of use in enabling disputes of all kinds to be speedily settled.

271. As soon as one party learns of the other's breach of contract, he should take measures to keep the resulting loss down as much as possible. For instance, if a teamster is employed to do hauling for a year, but is unjustly discharged during the year, he should seek other work for his teams, and not let them stand in his stable with the hope of recovering the entire contract price from his employer. He cannot recover any damages beyond such as he clearly proves. Only the net value of a contract can be recovered, and when the injured party asks damages for a breach, he must show that they are the direct outcome of the breach and such as the other party could reasonably have foreseen. Thus if X, who has agreed to sell you a certain article, fails to deliver it, you can make him pay only your net loss. That loss consists of the difference between the price at which X was to sell it and the market price of such articles at the time and the place when and where delivery should have been made, with interest on this difference. The mere fact that the non-delivery prevented you from selling the article to a customer at a big advance, does not ordinarily entitle you to recover the profits you would have made on such second transaction.

272. After a contract has been broken by one party, the other has a limited time within which to sue for damages. If he lets this time pass without starting suit, and in the meantime his claim has not been definitely conceded by the party who committed the breach, the right to obtain damages by an action at law expires. This matter is regulated in the states by the "statutes of limitations." The following table shows the laws of the various states regarding the number of years which it takes to outlaw: (1) a claim which has been reduced to judgment by legal proceedings; (2) a contract which is evidenced by a writ-

ing under seal; (3) a contract which is evidenced by an unsealed writing; (4) an open account, as in the case of goods sold to a party who has never signed a contract to pay for them.

State.	Open Account.	Simple Written Contract.	Written and Sealed Contract.	Judgment.
Alabama	3	6	10	20
Alaska	6	6	10	10
Arizona	3	6	6	5
Arkansas	3	3	5	10
California	4	4	4	5
Colorado	6	6	6	20
Connecticut	6	6	17	No limit
Delaware	3	6	20	10
District of Columbia	3	3	12	12
Florida	3	5	20	20
Georgia	4	6	20	7
Idaho	4	5	5	6
Illinois	5	10	10	20
Indiana	6	10	10	20
Iowa	5	10	10	20
Kansas	3	5	5	5
Kentucky	2 to 5	15	15	15
Louisiana	3	5	10	10
Maine	6	6	20	20
Maryland	3	3	12	12
Massachusetts	6	6	20	20
Michigan	6	6	10	10
Minnesota	6	6	6	10
Mississippi	3	6	6	7
Missouri	5	10	10	10
Montana	5	8	8	10
Nebraska	4	5	5	5
Nevada	4	6	6	6
New Hampshire	6	6	20	20
New Jersey	6	6	16	20
New Mexico	4	4	6	7
New York	6	6	20	20
North Carolina	3	3	10	10
North Dakota	6	6	10	10
Ohio	6	15	15	21
Oklahoma	3	5	5	5
Oregon	6	6	10	10
Pennsylvania	6	6	20	20
Rhode Island	6	6	20	20

State.	Open Account.	Simple Written Contract.	Written and Sealed Contract.	Judgment.
South Carolina	6	6	20	20
South Dakota	6	6	20	20
Tennessee	6	6	6	10
Texas	2	4	4	10
Utah	4	6	6	8
Vermont	6	6	8	8
Virginia	3 to 5	5	10	20
Washington	3	6	6	6
West Virginia	5	10	10	10
Wisconsin	6	6	20	20
Wyoming	8	10	10	5

QUESTIONS

1. What is the effect of the breach of an essential term in a contract? Define and illustrate collateral warranty. What is the effect of the breach of a collateral warranty?

2. What is an entire contract?

3. What is a severable contract?

4. What is the effect of the breach of an entire contract? What is the effect of the breach of a severable contract?

5. What is the effect of failure to perform a contract by the time fixed?

6. Is the time clause usually regarded as vital in building contracts?

7. What are liquidated damages?

8. What is the general rule as to the amount of liquidated damages?

9. Noerling sues Brennan for breach of contract and recovers $1,000 damages. May he call upon Brennan to pay his attorney's fee in addition to the $1,000 damages?

10. Hawley engages Sanger as bookkeeper at a salary of $15 per week. Sanger agrees to remain in Hawley's employ for one year, and Hawley agrees to employ Sanger for that length of time. At the end of three months, Hawley notifies Sanger that he has no further use for his services. Sanger makes no effort to obtain

other employment and at the end of the year sues Hawley for breach of contract. Hawley shows that a month after Sanger left him the latter could have secured employment similar to Hawley's from Coates at $12 per week. What sum is Sanger entitled to recover as damages?

11. Parker agrees to sell and deliver to Williamson 10,000 bushels of wheat by June 15th at a price of $1.10 per bushel. Williamson, relying on Parker's contract, agrees with Dietz to sell and deliver to Dietz on June 16th, 10,000 bushels of wheat at $1.35 per bushel. Parker fails to deliver the wheat to Williamson on June 15th and as a consequence in order to fill his contract with Dietz, Williamson is obliged to go out into the market and buy wheat at $1.25 per bushel. Williamson sues Parker for breach of his contract. How much is he entitled to recover?

12. What is meant by the outlawry of actions? What is the Statute of Limitations? When is an open account outlawed in your state? A simple or written contract? A written and sealed contract? A judgment?

CHAPTER XVII

DISCHARGE OF CONTRACTS BY IMPOSSIBILITY

273. In a few cases impossibility discharges a contract. In most cases, however, it is no excuse for a party who cannot fulfill his contractual promise to prove that performance is impossible. He should have learned that before making the promise. Still more, it is no excuse for him to show that the performance of what he has agreed to do would entail heavy expense, inconvenience, and hardship beyond his expectation.

274. Where a contract is for purely personal services, it is usually discharged if performance is prevented by the death or sickness of the person who is to render them. The majority of contracts, however, are not affected by the sickness of either or both of the parties, and will survive even their death. In case of a party's death, his contractual rights ordinarily pass to his estate, while the obligations which he undertook figure as liabilities of his estate.

SPALDING *v.* ROSA, 71 N. Y. 40 (1877). Rosa agreed to furnish the Wachtel Opera Troupe to give eight performances in Spalding's theater at certain times. Wachtel was the chief singer and attraction, the troupe being named after him. He fell sick and was unable to sing. In consequence Rosa did not furnish the troupe at the times specified, and Spalding sued for damages. *Held* that Wachtel's sickness, occurring without Rosa's fault, constituted a good excuse for the nonperformance of the contract. Such contracts for the personal services either of the contracting party or of another person, which can be performed only by the particular individual, are discharged if he becomes disabled without fault on the part of the one who agreed to furnish his services.

275. If, before the time for performing a contract expires, a new law is established or some other action is taken by the public authorities rendering performance legally impossible, the contract is discharged.

QUESTIONS

1. When will impossibility of performance discharge a contract?

2. Kelly agreed with Bradenberg to pitch on the latter's baseball team for the season of 1909. Kelly was a star and had always been a great attraction with the public. He fell sick and was unable to play during the entire season. Bradenberg sued Kelly for damages. Is he entitled to recover?

3. Pye agreed to sell and deliver to Lofland 10,000 cords of A1 hemlock lumber from the Wagner reservation before July 15, 1909. The amount of lumber on the Wagner reservation was limited and on June 1, 1909, before any lumber had been cut a forest fire destroyed all the standing timber so that Pye could not fulfill his contract. Lofland sued Pye for damages. May he recover?

CHAPTER XVIII

DISCHARGE OF CONTRACTS BY BANKRUPTCY

276. Only the United States Congress has power to pass a bankrupt law discharging insolvent debtors from their preëxisting debts and other contractual obligations. The bankruptcy statute enacted by Congress in 1898 was designed not only to relieve poor debtors and enable them to start life anew, but also to prevent one creditor from obtaining an unfair preference over the others. Bankruptcy proceedings may be set on foot not only by an insolvent debtor, but also by creditors, and the statute aims at adjusting the rights of all parties interested.

277. When you learn that one of your debtors has gone into bankruptcy you should take prompt measures to prove your claim if you want to get a share of his assets. You must prove it according to a set form, printed copies of which may be bought from any law stationer. There are different forms for secured and unsecured creditors, and again the form for proof by a partnership is different from that made by an individual creditor or a corporation. The treasurer of a corporation is the proper officer to swear to its claim. If your corporation employs no official called the treasurer, the person whose duties are most nearly like those of a treasurer is the proper one. For instance, the cashier of a national bank swears to the bank's proof of claim.

278. If you claim on a bill for merchandise, a full itemized account should be attached to your sworn proof. If you claim on a promissory note, bond, or other written

contract, you should take the original document and a copy of it to the referee in bankruptcy. He will compare the two and file the copy with your sworn proof of claim, so that you may safely preserve the original yourself. Usually you have a year within which to file your claim, but, if possible, prove it before the referee several days in advance of the first meeting of the bankrupt's creditors. This gives you a chance to correct your proof if it is in bad shape, and thus to qualify yourself to vote for a satisfactory trustee. In most cases it is wise to give your attorney written authority to vote for you at creditors' meetings, especially at the first meeting when the trustee is elected. The power of attorney should be drawn up and executed with due legal formality.

279. The following quotations from the Bankruptcy Law of July 1, 1898, as amended February 5, 1903, June 15, 1906, June 25, 1910, and March 2, 1917, show the most important provisions of the law on this subject.

(A) Who may become bankrupts

280. Any person, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

281. Any natural person except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed business or commercial corporation (except a municipal, railroad, insurance or banking corporation) owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stock-

holders, as such from any liability under the laws of a state or territory or of the United States.

(B) How to force one into bankruptcy

282. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground.

283. A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or con-

tinuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.

(C) Bankrupt partnerships

284. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

285. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. See Section 386.

286. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

(D) Duties and exemptions of bankrupts

287. *Exemptions of bankrupts.*—This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

288. *Duties of bankrupts.*—The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concern-

ing the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding. Provided, however, that he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence.

(E) Compositions: the discharge of bankrupts

289. A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors, required to be filed by bankrupts. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority, and the costs of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon such application for the con-

firmation of a composition, and such objections as may be made to its confirmation. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

290. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

291. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

292. Any person may, after the expiration of one month, and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next six months.

293. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed

to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court: provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

294. *Debts not affected by a discharge.*—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages due to workmen, clerks, traveling or

city salesmen, or servants, which have been earned within three months before the date of commencement of the proceedings in bankruptcy; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment.

(F) Offenses against the bankruptcy statute

295. A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; or (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy or attorney, or as agent, proxy or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

(G) Management of bankrupt estates

296. *Appointment of referees.*—The Courts of Bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

297. *Duties of referees.*—Referees shall (1) declare dividends, and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse or neglect to do so; (7) safely keep, perfect and transmit to the clerks the records herein required to be kept by them when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

298. *Appointment of trustees.*—The creditors of a bankrupt estate shall, at their first meeting after the adjudication, or after a vacancy has occurred in the office of

trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

299. *Duties of trustees.*—Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable preceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources, and all amounts expended, and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the con-

dition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

(H) Creditors and their claims

300. *Proof and allowance of claims.*—Proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

301. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

302. *Preferred creditors.*—A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or regis-

tering of the transfer, if by law such recording or registering is required.

303. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person, or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

304. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: (1) The actual and necessary cost of pre-

serving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority.

305. *Declaration and payment of dividends.*—Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

(I) State insolvency laws

306. The various states of the Union have passed local laws for the administration of the property of insolvent debtors. These state laws have many features in common with the national bankruptcy statute heretofore treated in this chapter. See Section 276.

307. One reason for passing the United States Bankruptcy Law was to provide a uniform system for administering bankrupt estates throughout the country, for the

insolvent laws of the various states differ in many particulars. The United States law provides that if the property of any person or corporation subject to its terms shall be taken charge of by an assignee or receiver under state laws, this will justify the creditors in having the matter transferred to the United States Bankruptcy Courts. See Section 282.

In re PICKENS MFG. CO., 20 Am. B.R. (Ga.) 202 (1908). The Georgia Code provides that in case any corporation, not municipal, or any trader or firm of traders, "shall fail to pay at maturity any one or more matured debts," a court of equity shall have power to appoint a receiver on a creditor's petition. Under this section with the consent of the Pickens Manufacturing Company temporary receivers were appointed by the Georgia state court. Afterwards certain creditors filed a petition for involuntary bankruptcy in the United States Court, alleging that by consenting to the appointment of receivers in the state court, the company had committed an act of bankruptcy. *Held*, the company had committed an act of bankruptcy within the meaning of section 3a, subsection 4, of the statute. Moreover, the operation of the state insolvency law was suspended by the passage of the national bankruptcy statute, and all proceedings under the former were void. See Section 282.

QUESTIONS

1. Where is the exclusive power to pass a bankruptcy law, affecting antecedent obligations, lodged?
2. What was the design of the National Bankruptcy Act of 1898?
3. Who may start bankruptcy proceedings?
4. When you learn that one of your debtors has gone into bankruptcy how should you proceed to get a share of his estate?
5. How are proofs of debt executed when the claimant is: (*a*) a corporation; (*b*) a national bank; (*c*) a partnership?
6. How long a time has a creditor of a bankrupt in which to file a proof of claim?
7. Who may become a voluntary bankrupt?
8. May a corporation file a petition to be adjudged a voluntary bankrupt?

9. Who may be adjudged an involuntary bankrupt?

10. Enumerate the five acts of bankruptcy.

11. Within what time must a petition against a person who is insolvent, and who has committed an act of bankruptcy, be filed?

12. May a partnership become a bankrupt?

13. Who appoints a trustee in the case of bankrupt partnerships?

14. How is the property of the partnership apportioned as between the creditors of the partnership and the creditors of the respective partners? What effect does the bankruptcy of one of the members of a partnership have upon the partnership property?

15. What exemptions are allowed to bankrupts?

16. Enumerate the duties of bankrupts.

17. When may a bankrupt offer terms of composition to his creditors? When may an application for the confirmation of a composition be filed?

18. When will the judge confirm a composition? Upon the confirmation of a composition how is the consideration distributed? What is the effect if the composition is not confirmed?

19. Does the confirmation of a composition discharge the bankrupt from his debts?

20. Within what time may a bankrupt file an application for a discharge?

21. What are the proceedings upon an application for a discharge?

22. What acts, if committed by the bankrupt, will prevent the granting of such an application?

23. What debts are not affected by a discharge?

24. Enumerate certain offenses against the bankruptcy act and state the penalties for each.

25. How are referees in bankruptcy appointed?

26. How long do they hold office? What are the duties of referees?

27. How are trustees in bankruptcy appointed? What are the duties of trustees?

28. Of what does a proof of claim in bankruptcy consist?

29. What is the rule with regard to the claims of secured creditors?

30. Who are preferred creditors?

31. What is the effect of a preference where the person receiving

it or to be benefited thereby or his agent therein shall have had reasonable cause to believe that it was intended as a preference?

32. What debts will the court order the trustee to pay?

33. What is the usual order of priority in payment of debts? On what claims are dividends declared?

34. May a state pass a bankrupt act? What is the effect of the transfer of an insolvent's property under state laws to a receiver or trustee?

BOOK SECOND

AGENCY, PARTNERSHIPS AND CORPORATIONS

AGENCY

CHAPTER XIX

THE FORMATION OF AGENCY

308. An agent is one who is authorized to act on behalf of another, and who does so act. The person for whom he acts is called the principal or employer, and the person acting is called the servant, agent, or employee. Agency is defined as a relation whereby one person employs another to act for him in respect of a particular transaction or a series of transactions.

309. The California Code (paragraph 2295) declares: "An agent is one who represents another called the principal in dealings with third persons; such representation is called agency." Similar definitions are found in the enactments of various other states.

310. There are two classes of agents: (1) general agents; (2) special agents. A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A special agent is an agent authorized to do one or more specific acts for his principal in pursuance of particular instructions.

311. As a rule an agent may not delegate his authority, for the relation of principal and agent usually presupposes confidence on the principal's part in the agent's personal

ability and integrity. The power of attorney shown on page 171 specially authorizes the agent to substitute another in his place. The latter is called a subagent.

312. There are four methods by which liability may be cast on one who is held as a principal: *first,* by express grant; *second,* by conduct or relationship; *third,* through estoppel; *fourth,* by ratification.

(A) Agency created by express grant

313. This is the usual method by which the relation of principal and agent is formed. Where agency is created in this manner, the grant may be, *first,* merely oral; or *second,* written; or *third,* sealed and written. An oral grant of authority is good for most purposes, and, in many jurisdictions, has been held sufficient to appoint an agent even for the sale of lands. While a writing is seldom necessary to create the relation of agency, it is safer to have the appointment confirmed by means of a written instrument. In some states authority to execute an instrument under seal can be conferred only by means of an instrument under seal, a mere written authority being insufficient for this purpose.

314. A document appointing an agent is called a power of attorney or letter of attorney. A form of letter of attorney to sell real estate is shown on page 171. Except in the case of an authorization to sell or mortgage real estate, it is seldom necessary to have the power or letter of attorney acknowledged before a notary public, as in the form on page 171.

(B) Agency implied from conduct or relationship

1. From Conduct

315. The appointment of an agent need not be by express words, but may be implied from the conduct or relation of the parties. Partners, for example, are general

KNOW ALL MEN BY THESE PRESENTS, That I, Thomas Osborne, of the City of Chicago, County of Cook, State of Illinois, have made, constituted and appointed, and hereby make, constitute, and appoint Eugene Wrayburn of New York, Kings County, State of New York, my true and lawful attorney for me and in my name and stead, to grant, bargain and sell premises 657 Pacific Avenue, New York City, N. Y., containing forty feet in frontage on Pacific Avenue, and having a depth of eighty feet, for such price and on such terms as to him shall seem best, and for me and my name to make, execute, acknowledge and deliver goods and sufficient deeds and conveyances for the same either with or without covenants and warranties, and to receive all sums of money which shall become due me by means of such bargain and sale, and to take all lawful means for the recovery thereof.

GIVING AND GRANTING unto my said attorney full power and authority to do all acts and things whatsoever requisite and desirable to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitutes, shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF I have set my hand and seal hereto this 25th day of August, 1927.

[*Signed*] THOMAS OSBORNE (Seal)

Signed, sealed and delivered in the presence of:
[*Signed*] MORTIMER LIGHTWOOD

STATE OF NEW YORK
COUNTY OF KINGS } ss.

On the 25th day of August, A.D. 1927, before me personally came Thomas Osborne, known to me to be the individual described in, and who executed, the foregoing instrument, and he duly acknowledged that he executed the same and desired that the same be recorded as such.

[*Signed*] JACOB ANDERSON,
Notary Public,
Commission expires January 5, 1928.

{ NOTARIAL SEAL }

agents for one another in all matters within the scope of the partnership business. See Chapter XXIII.

316. Many other circumstances may justify the conclusion that agency exists. For example, a guest of a hotel is warranted in assuming that the clerk in charge of the office who assigns rooms, etc., has authority to take charge of money handed to him for safe keeping, the reason being that it is customary for a hotel clerk to receive the valuables of guests for safe keeping. One should, however, be careful about inferring that because a person is an agent for one purpose, he is also an agent for another similar though unconnected purpose.

NOBLE *v.* BURNEY, 124 Ga. 960 (1906). Burney rented a storehouse from Noble from February 1, 1902, to February 1, 1903. During the year he paid the rent to McOsker, Noble's agent to collect rents. Before Burney's year expired, McOsker verbally renewed Burney's lease for another year. Noble denied that McOsker was authorized to renew the contract of rental, and sued to put Burney out of possession. *Held*, the fact that McOsker was Noble's agent to receive rents did not prove that he was his agent to make a contract of rental.

2. FROM RELATIONSHIP

317. Usually the fact that one person is related by blood or marriage to another gives him no right to represent the other. But where a husband does not provide his wife with necessaries, the wife's agency to purchase necessaries for herself and minor children on her husband's credit will be presumed. A minor child has also implied authority to purchase necessaries on his father's credit, in case of the father's wrongful neglect to supply them. See Section 85.

(C Agency presumed through estoppel

318. A presumption of agency may arise against the wishes of the one held liable as principal, if he allows him-

self to appear such. Thus, where A holds B out as his agent, or knowingly permits B to hold himself out as his, A's, agent, for the transaction of certain business, A is estopped (that is, precluded) from denying to third persons who have acted on the faith of the representation that B is his agent. Whether or not A intended to be bound as principal is immaterial, so far as third persons who acted in reliance on the representation are concerned.

Black Lick Lumber Co. *v.* Camp Construction Co., 60 S. E. (W. Va.) 409 (1908). The Camp Construction Company was building a tunnel for a railroad. Graham, acting as general manager for the Construction Company, bought provisions and lumber from the Black Lick Lumber Company. The Construction Company refused to pay for them, denying Graham's authority, and the Lumber Company sued. *Held*, Graham's acts in buying on the credit of the Construction Company were so open and notorious that they must have been known and assented to by the Construction Company. The Construction Company was, therefore, liable as a principal.

319. In order to prove an agency by estoppel one must show a representation from which the agency relation might be reasonably inferred, and that one has acted on the faith of this representation.

(D) Agency created by ratification

320. The fourth method in which agency may arise is by ratification of past acts. Where B assumes to act as the agent of A, either without any real or apparent authority, or in excess of his authority, A is not liable unless, with full knowledge of the fact that B has assumed to act as his agent, he acquiesces in or receives the benefits of B's acts. In this case A will be held to have ratified B's unauthorized conduct. Such subsequent ratification is equivalent to a prior authorization.

Stetson Preston Co. *v.* H. S. Dodson & Co., 103 S.W. (Tex.) 685 (1907). Stetson Preston Company had sold goods to H. S.

Dodson & Company. The amount due was in dispute. Dodson & Company arranged a settlement with McClellan, the agent of the Stetson Preston Company, and sent a check to the Stetson Preston Company for the amount with a letter, stating that it was in full settlement of their claim pursuant to the agreement made with McClellan. Stetson Preston Company cashed the check, but wrote Dodson that they did not intend to be bound by the settlement made by McClellan, although they would credit the amount on account. Then Stetson Preston Company sued Dodson for the balance. *Held* that they could not recover. They could not repudiate the settlement and at the same time use the check sent in pursuance thereof. Even though the act of McClellan was unauthorized, retaining and using the check amounted to a ratification.

QUESTIONS

1. Define agency. Principal. Agent.
2. How many classes of agents are there? Define each class.
3. What is the rule as to the delegation of his authority by an agent?
4. Enumerate the methods by which the relation of principal and agent may be created.
5. Define a power of attorney or letter of attorney. Give a specimen form of power of attorney.
6. From what circumstances may the relation of principal and agent be implied?
7. What are the limits of a wife's agency for her husband?
8. What are the limits of a minor's agency for his parent?
9. Define agency by estoppel. Give an illustration.
10. Define and illustrate agency by ratification.

CHAPTER XX

RIGHTS AND OBLIGATIONS OF PRINCIPALS, AGENTS, AND THIRD PARTIES

321. Since *right* and *obligation* are converse terms, it follows that a consideration of the rights of a principal as against his agent will include the obligations due by an agent to his principal. It will suffice then to speak merely about the obligations which are incurred by principals, agents, and third parties. These may be divided into six classes: *first*, obligations of the agent toward his principal; *second*, obligations of the agent toward third parties; *third*, obligations of the principal toward his agent; *fourth*, obligations of the principal toward third parties; *fifth*, obligations of third parties toward the principal; *sixth*, obligations of third parties toward the agent.

(A) The agent's obligations toward his principal

322. An agent must follow his principal's instructions with fidelity. Sometimes instructions of the principal will be implied from a trade usage or custom, or from a previous course of dealing between the parties. Express instructions, however, will prevail over any which might be so implied. The agent is liable for any deviation from his instructions which results in damage to his principal. But he is excused from following his principal's instructions where they involve the commission of an illegal or immoral act.

Chase *v.* Baskerville, 93 Minn. 402 (1904). Chase shipped an automobile to Baskerville at Watertown, South Dakota, to be sold for a certain price. Baskerville, without Chase's permission, sold the automobile to Mowbray for about half the price fixed by Chase. Chase sued Baskerville for the difference between the price at which he was authorized to sell the automobile and the price at which he had actually sold it. *Held* that Baskerville was liable to Chase for violating his instructions.

323. An agent who is compensated for his services is bound to serve his principal with reasonable skill and ordinary diligence. He is liable for any loss due to lack of either of these qualities. But he does not generally insure the success of any enterprise which he undertakes. Therefore, if he has acted in good faith and with reasonable care and skill, he is not responsible for mere errors of judgment. Neither is he liable for loss of property by theft or fire, if he has not been negligent.

Citizens' Savings Association *v.* Friedley, 123 Ind. 143 (1889). On the advice of Friedley, an attorney, who certified that title to certain real estate was available to secure a loan, the association lent $400 to one of its shareholders. The real estate was owned by the applicant and his wife as tenants by the entireties. The borrower died, and his wife successfully resisted a suit to foreclose the mortgage on the ground that she had signed the note and mortgage merely as surety for her husband. Thereupon the association sued the attorney, Friedley. *Held* that Friedley was not liable, as he had given the advice with reasonable skill and knowledge. The fact that the Supreme Court decided after he had given the advice that a mortgage executed by husband and wife on lands held by them as tenants by the entireties was void, did not make him negligent, as that was a point of law not finally decided before, and a point upon which well-informed lawyers might differ.

324. A gratuitous agent is not generally liable for omitting to do what he has promised his principal. If he sets about doing it, however, he is liable for any gross negli-

gence of which he may be guilty. And if he gives his principal to understand that he has certain skill or knowledge, he will be liable for any loss or injury arising from the failure to exercise such skill or knowledge.

ISHAM *v.* POST, 141 N. Y. 100 (1894). Post was a banker in New York City. Isham employed Post to lend $25,000 for him, which Post agreed to do gratuitously. Post was negligent in negotiating the loan and took as collateral certain certificates of stock which had been forged. As a consequence, loss resulted to Isham. *Held* that Post was liable. The fact that Post's services were rendered gratuitously did not free him from obligation to display whatever knowledge and ability he had held himself out as possessing.

325. The relation of principal and agent being a fiduciary one, it is the agent's duty to exercise good faith and loyalty toward his principal. Therefore, the agent may not enter into any transaction in which he has a secret personal interest or in which he secretly assumes a position antagonistic to his principal. He cannot act both as a party in interest and an agent without explaining to his principal about his dual capacity. He must not represent two parties in a transaction where their interests conflict without first getting the consent of both. If he violates this rule, he is not entitled to compensation from either, unless his principals ratify his double agency.

326. The agent's duty of good faith toward his principal demands that he shall not make any profit for himself out of the relationship, other than that agreed upon as a compensation for his services. Where an agent uses his position as agent for his own benefit, the advantage thus acquired will be held to belong to his employer.

MONTGOMERY *v.* HUNDLEY, 103 S. W. (Mo.) 527 (1907). Hundley, Shackelford, and McKnight were shareholders in a close corporation. Hundley got an option on Shackelford's stock for $5,750. Later he told Montgomery that he could purchase some

of the company's stock for Montgomery, if the latter would authorize him to do so. Montgomery assented, and Hundley sold Montgomery Shackelford's stock for $7,000. When Montgomery learned all these facts, he sued Hundley to set aside the contract and get back his money. *Held* that Montgomery was entitled to recover. Hundley was Montgomery's agent to buy stock, and could not make a profit for himself by acting both for Montgomery to buy the stock and for himself to sell it.

327. An agent must account to his principal for all money and property coming into his hands by virtue of the agency. He should, therefore, keep accurate records of everything received by him, and submit statements thereof to his principal as often as required by the contract of employment or upon demand. He ought never to mingle his own property or money with that of his principal. If he does so, and it is impossible to distinguish which belongs to the principal and which to the agent, the whole will be awarded to the principal.

(B) The agent's obligations toward third parties

328. A person who contracts with a third party as an agent, and who is known to be so contracting, does not incur any personal liability. The intention of the parties is to bind only the principal and the third party, and ordinarily they alone are bound. Where the agent's act is authorized, it is just as much the act of the principal as if he were present contracting in person.

329. If, however, the agent does not reveal the fact that he is an agent, and it is subsequently disclosed to the third party, he may proceed either against the agent or the principal. But when he has shown his intention of proceeding against a certain one of them, he cannot afterwards drop this course and hold the other.

330. Where an agent, who undertakes something in his principal's name, exceeds or departs from the authority

conferred on him, the principal is usually not bound. However, the principal may be estopped to dispute the agent's authority, or he may ratify what the agent has done, in either of which cases the principal, and not the agent, is liable to the third party. But if the principal successfully repudiates the agent's authority, the other party can force the agent personally to make good an ensuing loss, provided such party did not know at the outset that the agent was guilty of overstepping his powers.

BROWN v. BRADLEE, 156 Mass. 28 (1892). Bradlee and others offered a reward in the following terms: "$2.500 reward will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot Cunningham. (Signed) Bradlee, Ruggles, Simpson, Selectmen of Milton." Brown earned the reward, but the town of Milton refused to pay it on the ground that the selectmen had overstepped their powers in the matter. *Held* that Bradlee, Ruggles, and Simpson were personally liable in view of the fact that they had no authority to offer this reward on behalf of the town of Milton.

331. An agent is not liable to third persons by reason of his omission to perform a duty owing to his principal. But if, in serving his principal, he commits a tort which injures a third person, he becomes responsible for the damage therefrom ensuing. He cannot excuse himself for committing a wrong by showing that he was acting on behalf of another person.

(C) The principal's obligations toward his agent

1. As respects the agent's compensation

332. The agent's right to remuneration depends upon the circumstances of the case. Where there is an express agreement as to the amount of the agent's compensation, his rights are limited to that agreement. The agreement may be definite and conclusive as to the amount, or the agent's compensation may be made to depend upon a contingency.

Where there is no promise to pay, and A performs services for B, at B's request, the law generally implies a promise on B's part to pay A what his services are reasonably worth. But where one performs services without request from another, or under circumstances where no promise to pay can be reasonably inferred, the law will not enforce payment.

LEE *v.* LEE, 6 Gill. & J. (Md.) 316 (1834). Stephen Lee for a period of six years superintended his father's farms. On the father's death, Stephen Lee filed a claim for compensation at the rate of $150 per annum for this work. There was no agreement by the father to pay, and it was proved that Stephen had said that he expected that his father would provide for his compensation in his will. *Held* that Stephen could not recover, as he had rendered the services without any promise of remuneration, express or implied, or without expectation of being paid the value thereof, but rather with a view to getting a voluntary legacy.

333. Unless otherwise agreed, the agent becomes entitled to remuneration only when he has fully performed the services for which he was employed. If the services have been so carelessly rendered as to make them of no value to the principal, the agent is entitled to no compensation whatever. Slight negligence subjects the agent to the loss of such part of his compensation as is equivalent to the damage suffered by the principal through the agent's negligence.

334. The agent is entitled to be reimbursed for all legitimate advances made by him on behalf of his principal.

2. As respects the agent's health and safety

335. A master owes to his servant the duty of exercising ordinary care to protect him from injury, of providing him a reasonably safe place to work in, and reasonably safe tools and appliances, and of selecting competent fellow-workmen. If the servant is injured through the master's

neglect of this duty the master is liable. And, in many states, most employers, even though they have discharged this duty, must pay an employee for injuries received by him in the course of his employment. This liability is cast on employers by the terms of the Workmen's Compensation Acts.

336. The provisions of the Workmen's Compensation laws, as passed in the state where this legislation has been adopted, vary in many particulars. Ordinarily the amount of compensation is scaled according to the nature and the probable duration of the injuries, the amount of wages previously received by the employee and the number of those dependent on him. If death results from the injuries, the amount payable by the employer is apportioned among the decedent's family in the manner fixed by the local Workmen's Compensation statute.

(D) The principal's obligations toward third parties

337. A principal is liable to third parties for all the authorized acts of his agent. The principal is also liable to third parties for the unauthorized acts of his agent, if he subsequently ratifies them. Where an agent acts within the scope of the authority with which his principal has seemingly clothed him, the principal is liable to a third person for acts in excess of the agent's actual authority unless the third person knows that the agent is exceeding his powers.

Brown *v.* Grady, 92 Pac. (Wyo.) 622 (1907). Grady authorized his agent Jones to sell certain real estate for $2,200, $400 down, the balance in four equal annual installments, all taxes and assessments to be paid by the purchaser, the deed to be delivered on payment of the second installment. Jones contracted to sell to Brown and to deliver the deed on the first annual payment. No provision was made as to payment of taxes and assessments.

Brown sued to be put in possession of the land. *Held*, Jones had clearly exceeded his authority and in the absence of anything to show that Grady had given Jones real or apparent authority to make the agreement into which Jones had entered, or had ratified such agreement, Grady was not bound thereby.

338. The principal is liable to third parties for wrongful acts committed by the agent at the principal's command, or subsequently ratified by him. He is also liable for the tortious acts of the agent when acting within the scope of his employment, and in furtherance of his principal's business, even though he did not authorize them.

339. The principal is not usually liable for the criminal acts of his agent unless he authorizes or assents to them. An exception to this rule is made in cases of libel and nuisance. In these cases the principal is liable for the acts of his servants upon the ground of his negligence in failing to exercise proper control over them.

340. Notice to an agent in charge of the matter to which the notice relates is deemed to be notice to the principal.

341. Statements and representations made by an agent within the scope of his authority are binding on the principal.

(E) The obligations of third parties toward the principal

342. Where a contract is made by an agent as agent, usually the third person is liable only to the principal, who alone can sue on the contract. In such suit, the third party may defend on the ground of the agent's fraud or misrepresentation in connection with the contract, just as he might if the principal himself had been similarly guilty.

343. Usually, also, where an agent, X, makes a contract in his own name, on behalf of an undisclosed prin-

cipal, this principal may sue on the contract in his own name, unless it appears that the third party intended to contract with X only.

MANKER *v.* WESTERN UNION TELEGRAPH CO., 137 Ala. 292 (1902). Frank Lash sent a telegram to Manker telling her that her father was dying and summoning her to his bedside. The telegraph company negligently failed to deliver the message promptly, and as a consequence Manker was unable to see her father before he died. She then sued the telegraph company for its negligence. *Held* that Lash was Manker's agent in sending the telegram. She therefore had the right to sue on the contract even though the fact that Lash was acting as her agent had not been disclosed to the telegraph company.

344. Where an undisclosed principal sues a third party on a contract made by his agent as an ostensible principal, the third party may assert every defense against the principal which he could have invoked against the agent, provided that such defense existed when the third party was first notified of the agency.

345. Where an agent, in violation of his duty, has turned over money or other property of his principal to a third party or permitted it to be appropriated by him, the principal may recover it if the third party knew that the agent was unauthorized. The principal has also a right of action for damages against anyone who injures or seizes his property while in the agent's possession.

(F) The obligations of third parties toward the agent

346. Where an agent contracts as agent, usually the principal alone can sue and be sued. But an agent may sue in his own name on a contract made by him on his principal's behalf, when the contract is not under seal or negotiable and purports to be made with him personally, although the third party knew that he was acting as agent.

SNIDER *v.* ADAMS EXPRESS CO., 77 Mo. 523 (1883). Henry J. Snider, having sold land as the agent of his sister Louisa and received the purchase money, delivered the money to Adams Express Company for transportation to the owner. The money being lost in transit, Henry J. Snider brought suit in his own name. *Held* that he could recover. He could sue either in his own name or as agent for his principal.

347. An agent may sue third persons for personal torts or for injuries to the property of the principal in his possession and control.

QUESTIONS

1. What is the agent's duty with regard to his principal's instructions?
2. What is his liability for deviation from his principal's instructions?
3. When is he excused from following his principal's instructions?
4. To what degree of skill is an agent for hire held?
5. When is a gratuitous agent liable to his principal?
6. Childs employed Reed to buy Donovan's horse, Ginger, for him at the price of $300. Reed went to Donovan and bought the horse for $200 and afterwards sold it to Childs for $300. What remedy has Childs upon learning these facts?
7. A employed B to sell certain stock for $5,000. B, as agent for A, agrees to sell the stock to C for the price fixed by A. In the meantime A has sold and delivered the stock to D. Is B liable to C?
8. Suppose in the above-mentioned case C had not known that B was acting for another person, what would be the extent of C's remedies?
9. Discuss the rights of an agent as to compensation and as to reimbursement for advances made on account of his principal.
10. Discuss the principal's obligations as respect the agent's health and safety.

11. For what acts of his agent is the principal liable to third parties?

12. When is the principal liable for the agent's (*a*) unauthorized attempts to make contracts on the principal's behalf, (*b*) tortious acts, (*c*) criminal acts?

13. When has an agent a right to sue on a contract in his own name?

14. What defenses are open to a third party in a suit by an undisclosed principal?

CHAPTER XXI

THE TERMINATION OF AGENCY

348. The agency relation may be terminated, just as contracts may be discharged, in any one of the five following ways: *first*, by agreement; *second*, by performance; *third*, by breach; *fourth*, by impossibility; *fifth*, by bankruptcy.

(A) Termination of agency by agreement

349. Like all other contracts, the contract of agency may be discharged by agreement of the parties. The principal and agent are free to cancel existing arrangements and part company at any time, even though they have agreed to remain together for a much longer time. Where no period has been fixed for the duration of the employment, usually either party may terminate it at once by so notifying the other.

(B) Termination of agency by performance

350. If an agent has been engaged for a particular transaction, the completion of that work terminates the relation. Again, if he has been engaged for a definite period of time, the relation is at an end when the period expires.

(C) Termination of agency by breach

351. Except as stated below, either party may terminate the relation at any time, subject to the right of the other party to recover damages for breach of any contract-

ual promise. The principal may arbitrarily revoke the agent's authority. When so revoked, the power of the agent to bind the principal ceases. If the principal revokes the agent's authority, he is liable to pay damages for breach of the contract of employment, in case he has previously agreed to continue the relation for a longer period.

352. An exception to the foregoing rule that the principal may revoke the agent's authority at any time occurs when the authority is "coupled with an interest." This happens when the authority is given not to further the principal's interest, but rather for the benefit of the agent or some third person.

SHEPHARD *v.* MCNAIL, 122 Mo. App. 418 (1906). Watson, a storekeeper, made McNail his agent to collect certain accounts owing to Watson, apply the proceeds to the liquidation of Watson's indebtedness to him, and turn over the balance. Watson died intestate and Shephard was appointed administrator. After Watson's death, McNail collected $160 which he applied to the payment of Watson's indebtedness. Shephard sued McNail to recover this amount. *Held* that McNail had enough interest in the accounts owing to Watson to make his authority irrevocable until the collections were sufficient to discharge Watson's debt to him.

353. Another example of a power of attorney coupled with an interest, is a judgment note or bond which contains a clause authorizing an attorney to appear in court for and confess judgment against the maker. This clause is for the benefit of the holder of the note or bond, and is a power of attorney which cannot usually be revoked by the principal. The same is true where shares of stock are pledged with a bank or trust company to secure payment of a loan. The power of attorney to transfer the shares standing in the name of the borrower on the books of the company, the stock of which he pledges, is also coupled with an interest and cannot be revoked by him.

354. The agent also can usually renounce the agency at any time. If he does so, however, when he has agreed to continue as agent for a longer period, he is liable for any damages suffered by his principal through the breach of contract. Where the agent's renunciation is not a breach of his contract, he is entitled to compensation for the work performed. But if the agent's renunciation is a breach of an entire contract of employment, he cannot generally recover anything.

355. In most contracts of agency there are implied conditions that the agent will use ordinary skill and diligence, and that he will act with good faith and loyalty toward his principal. The principal may discharge his agent for a breach of any of these implied conditions without incurring liability.

(D) Termination of agency by impossibility

356. Except in some cases in which the authority is coupled with an interest as stated above, the relation of principal and agent will be terminated by the death of either party. Even a power of attorney to confess judgment, as given in a judgment note or bond, is revoked by the giver's death, although coupled with an interest.

357. If either principal or agent becomes insane or is otherwise unable to continue the agency relation by reason of bodily or mental weakness, the agency is usually terminated.

(E) Termination of agency by bankruptcy

358. The principal's or the agent's bankruptcy usually terminates the agency, unless it is coupled with an interest. The bankruptcy of the principal terminates the authority of the agent, so far as relates to rights of property of which the principal is divested by the bankruptcy. By the

agent's bankruptcy his authority is often revoked, except as to the performance of acts which are merely formal.

QUESTIONS

1. Enumerate the ways in which the agency relation may be terminated.
2. Discuss the termination of agency by agreement.
3. Discuss the termination of agency by performance.
4. What rights has either party in case the other wrongfully terminates the relation?
5. What is the rule with regard to the revocation of an agency "coupled with an interest"?
6. Give two examples of a power of attorney coupled with an interest.
7. Discuss the termination of agency by impossibility.
8. Discuss the termination of agency by bankruptcy.

PARTNERSHIPS

CHAPTER XXII

THE FORMATION OF PARTNERSHIPS

359. When persons go into business together, they may decide to choose the partnership relation as the basis of their association. This relation is personal and intimate. Usually, each member of the firm is at the same time both a principal and an agent.

360. A partnership is a relation created by contract between two or more persons to place their credit, labor, skill, money or other property, or some or all of them, in lawful business, and to divide the profits as such between them. In many states partnerships have been defined by statute. The New York definition, which is typical, is as follows:

"Partnership is the association, not incorporated, of two or more persons who have agreed to combine their labor, property and skill, or some of them, for the purpose of engaging in lawful trade or business and sharing the profits and losses as such between them." 2 Cummings & Gilbert's General Laws of New York, 2643.

361. A partnership can be formed only by contract. The contract must contain the five elements necessary for the formation of every contract. In some cases the sixth element, special formality, is also required. See Section 155. Although usually the terms of a firm agreement are put in writing, yet even where there is no written con-

tract the existence of a partnership may usually be implied from the conduct of the partners. But in most states an agreement to form a partnership which is to last longer than one year must be in writing.

362. (*a*) A public or ostensible partner is one who is, and is known to be, a partner. (*b*) A silent partner is one who may or may not be known to the public as a partner, but who takes no active part in the management of the business. (*c*) A dormant partner is one who is not known to the public as a partner, and who takes no active part in the management of the business. The mere fact that a person is not publicly known to be a partner, and is not active in helping to run the firm, will not prevent his being liable as a partner. (*d*) A partner by estoppel (or nominal partner) is one who is reputed to be a partner, although really not such, and who knowingly allows himself to be held out as one. He is liable as a partner to those who deal with the firm, relying on his apparent membership therein. Nevertheless, since he is not a partner in fact, he is not entitled to participate with the real partners in the distribution of profits.

DAVENPORT WOOLEN MILLS CO. *v.* NEINSTEDT, 81 Ia. 226 (1890). The salesman of Davenport Woolen Mills Company was engaged in selling goods by sample to A. Neinstedt, who traded under the name of H. & A. Neinstedt. A man who was present recommended to A. Neinstedt the purchase of certain goods. The salesman inquired who he was, and was told that he was Charles Neinstedt, father of A. Neinstedt, and a member of the firm. Charles Neinstedt was within hearing distance, and did not deny this statement. *Held* that Charles Neinstedt was liable as a partner, although he was not really one, because at the time of the sale he had not denied that he was a partner, and the salesman had extended credit to the firm on the faith of this representation.

363. It is sometimes difficult to say whether or not a particular association of persons constitutes a partnership

The parties to a contract may use the word **partnership**, and yet their contract may not really make them partners. On the other hand, the parties to a contract may not intend to form a partnership and yet may in fact form one. If the arrangement into which they enter is really a partnership, they become partners, even though they expressly declare that they do not intend to do so.

364. One of the indications that a particular association of persons is a partnership is profit sharing or a proprietary interest in profits as such with a right to insist on an accounting and a division thereof at definite periods. But profit sharing must be kept distinct from participation in gross returns, which will not make one a partner.

BEECHER *v.* BUSH, 45 Mich. 188 (1881). Beecher owned a hotel in Detroit and rented it to Williams from day to day. Williams agreed to pay Beecher daily one third of the gross receipts. Bush sold supplies to Williams on credit. Williams not paying, Bush sued Beecher, alleging that he was a partner of Williams. *Held* that Beecher was not liable as a partner. The parties did not intend to form a partnership. Beecher had no control and was not a co-principal with Williams. His share of the gross receipts of the hotel business was to be paid him whether or not any profits were made out of the business of which Williams was the sole proprietor.

365. Sharing in the profits of an enterprise, whereby one receives a given proportion of profits as a reward either for his labor or for the use of his property, does not make one a partner. Thus, a landlord may receive a share of profits in lieu of rent without becoming his tenant's partner. A common example of this is an agreement for farming on shares, by which the owner of land agrees with another to furnish a certain proportion of seed, implements, and stock, the products to be divided at the end of a given time.

SHRUM, ADMINISTRATRIX *v.* SIMPSON, 155 Ind. 160 (1900). Shrum's husband owned a farm. He agreed with Simpson that the

latter should occupy and cultivate the land for a year, each party furnishing half the seed, implements, and stock, the products to be equally divided at the end of a year. *Held*, Shrum and Simpson were not partners. The agreement was meant to secure to the landlord, Shrum, a fair return from the products of the land as rent.

366. In most states one may lend money to a partnership and receive a share of the profits in lieu of, or in addition to, interest without becoming a partner. But if it appears that the so-called lender really controls the concern, he is liable as a member.

367. There is no arbitrary test for determining the existence of a partnership. The best way to learn whether or not alleged partners are in fact such, is to examine the contractual relation into which they have entered. If they have embarked property, labor, or skill in a common enterprise as principals and proprietors, having as such the rights of control and of participation in profits, then they are really partners and liable as such.

LANGLEY *v.* SANBORN, 114 N. W. (Wis.) 787 (1908). Sanborn agreed with Langley that if the latter would turn over to him an option to purchase certain lands he would look them over, and if he found that he could purchase them at a reasonable price, he would do so and divide the profits of the resale equally with Langley. Half the taxes and expenses of surveying were to be paid by Langley out of his share of profits. Sanborn purchased the lands by means of the option, but subsequently repudiated his agreement with Langley. *Held*, a partnership existed between Langley and Sanborn. There was a mutual contribution of property to an enterprise or adventure for the purpose of making profits therein in which the two parties were to be mutually interested as partners.

QUESTIONS

1. Define a partnership.
2. How are partnerships formed?

3. Define (*a*) a public or ostensible partner, (*b*) a silent partner, (*c*) a dormant partner, (*d*) a partner by estoppel.

4. How would you tell whether persons supposed to be partners are in fact partners?

5. Green and Clark were partners. West lent them $5,000 under an agreement that he was to have one-third of the net profits arising from Green and Clark's business. Does this agreement make West a partner in the firm of Green and Clark?

CHAPTER XXIII

THE RIGHTS AND OBLIGATIONS OF PARTNERS

368. The rights and obligations of a partner will be considered, *first*, as respects his fellow partners; *second*, as respects outsiders. As respects a partner's relation with his copartners, his rights and obligations, *first*, as a proprietor or principal, and, *second*, as an agent, will be considered.

(A) The relation of a partner toward his fellows as a co-proprietor of the firm

369. A partner is a co-owner of firm property, but he can neither lay claim to any specific piece of property as his own exclusive property nor sell for his own exclusive benefit a proportionate part of each piece of property belonging to the firm. This is because title to the firm assets is in the firm group and not in the individual members thereof. Each partner has an individual property right in the firm property, but his right is only to his proportionate share of the firm property after all firm debts have been paid and accounts settled between the partners.

370. It follows, therefore, that if one partner sells out his interest to a stranger, the purchaser does not acquire a right to demand a division of the firm assets as they then stand, but only to receive the retiring partner's share after all firm debts have been paid and the respective rights of the partners adjusted. For this reason the purchaser of a partner's interest cannot generally,

without an accounting, form an accurate estimate as to the value of his purchase, which may turn out to be worth very little.

371. A person who inherits a partner's interest in a firm acquires the same rights as a purchaser. He may demand an accounting and the payment to him of the share of the partner in whose shoes he stands, after all claims have been satisfied. Neither purchaser nor heir becomes a partner, because one of the fundamental rights of a partner is the right to choose associates. This forbids the introduction of a new associate into the firm without the consent of all the other members.

372. When disputes arise among partners, the will of the majority governs as to ordinary matters concerning the running of the firm business. The majority in imposing their will upon the minority must act in good faith for what they deem the best interests of the firm, after full hearing of the objections made by the minority. But the majority cannot go so far as to introduce any fundamental change in the business against the will of the minority.

373. By majority is here meant a majority in numbers rather than a majority in respect of the capital put into the business. For example, if there are five partners, two of whom own three fourths of the capital, and the other three own only one fourth, the three can control the policy of the firm in the absence of an agreement to the contrary.

KIRK *v.* HODGSON AND OTHERS, 3 Johnston Chancery (N. Y.) 400 (1818). Eastburn, Kirk, and Downes, a firm of booksellers, employed Hodgson as a clerk. Hodgson misappropriated firm funds to his own use, but Eastburn and Downes agreed to overlook the embezzlement and continue Hodgson in the firm's employ. Kirk sued Hodgson, Eastburn, and Downes, asking that his partners be ordered to discharge Hodgson from the firm's employ. *Held*, even though Kirk did not agree to continue Hodgson as a clerk, a majority of the firm might in the exercise of their judgment

agree to continue him. The will of the majority ought to govern, if there is nothing to impeach the good faith required in the partnership relation.

(B) The authority of a partner as an agent of the firm

374. As an agent of the firm, a partner may have, *first*, such powers as are *expressed* in the partnership agreement; *second*, such as are *implied* from the partnership relation. A partner's express powers vary with each partnership agreement. A partner's implied powers are usually, in the absence of an agreement to the contrary, as set forth in the following paragraphs.

375. Every general partner is ordinarily an agent for the partnership in the transaction of its business, with authority to do whatever is necessary to carry on such business in the usual manner, and for this purpose he may bind his copartners verbally or by an agreement in writing.

376. Since a partner may bind the firm by acts on its behalf within the scope of its business, he may, in the ordinary commercial partnership, buy on firm credit goods of the kind usually employed in the firm business, and the firm is liable for them even though the partner appropriates them to his own use. He has, further, an implied authority to accept payments and give receipts, to issue negotiable paper on behalf of the firm, and to engage and discharge servants and agents, due regard being always had to the nature and size of the firm's business.

377. Usually a partner has no implied authority to do any of the following acts, unless his fellow partners have abandoned the business to him or are incapable of acting: (1) to make an assignment of the partnership property to a creditor or to a third person in trust for the benefit of a creditor or of all creditors; (2) to dispose of the good

will of the business; (3) to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise; (4) to do any act which would make it impossible to carry on the ordinary business of the partnership; (5) to convey by deed real property title to which has been recorded in the partnership name; (6) to bind the firm by a contract of guaranty of his own or another's debt, unless this is in line with the firm's business.

378. The firm is liable for the torts of a partner committed while he is directly engaged on behalf of the firm and within the scope of the partnership business. This follows from the fact that he is a general agent of the firm. See Section 91. But the firm is not liable for tortious acts of a partner which are not within the scope of the firm business, as, for example, where one partner slanders a firm employee in order to gratify a private spite.

(C) A partner's duty of loyalty to his firm

379. The partnership relation involves a high degree of confidence in the honor and integrity of one's associates. A partner, therefore, owes to his fellows the utmost good faith and loyalty. He must not in connection with firm transactions and without the knowledge of his copartners take any profits in which they do not share. If he does, such profits will be held to belong to the firm. A partner should not engage in business on his individual account which will lead him into competition with his firm.

LATTA *v.* KILBOURN, 150 U. S. 524 (1893). Latta and Kilbourn were partners in the real estate business, although they never speculated in real estate on the firm's account. Kilbourn engaged in real estate speculation on his own account, but this did not interfere with the firm's business. Latta sued Kilbourn for an accounting and division of the profits. *Held*, as Kilbourn's speculation in real estate on his private account did not bring him into

competition with his firm, he had not violated his duty of loyalty; and could not be compelled to turn over his profits.

380. Every partner owes his firm the duty of devoting himself to its business earnestly and diligently. If he neglects the firm business, his fellows may have the partnership dissolved, and hold him liable for the losses sustained by the firm through his breach of duty. Usually in the absence of agreement, one partner cannot claim compensation for his services other than his share in the profits. Even though one partner becomes sick, and a great deal of additional work is thrown on the other partner, he is not entitled to extra compensation.

(D) Partnership accounts

381. Each partner should inform his associates fully and accurately concerning all transactions connected with the firm business. If one partner takes for himself anything which belongs to the firm, the other partners may make him account for a proportion thereof. So also upon the dissolution of the firm each partner is entitled to an accounting to determine the amount owed to or owing by the partners. Partners cannot ordinarily sue one another at law in respect of partnership transactions. Firm accounts are usually so complicated that actions at law would result in numerous suits and counter suits, which the courts do not favor. The object is to discourage a multiplicity of suits and to adjust rights wherever possible in one action for an accounting.

LARKIN *v.* MARTIN, 93 N. Y. Supp. 198 (1905). Larkin and Martin formed a partnership to lease certain land and erect improvements thereon. Larkin performed his part of the agreement, but Martin refused to turn over to him his share of the profits. Larkin sued for an accounting. *Held* that having performed his part of the contract, he was entitled to an accounting and a share of the profits.

382. Where there is no agreement on the subject, it is usual for partners to share profits equally. They must generally contribute to losses in the proportions in which they are entitled to share in profits. It is always better, however, to have a clear and express understanding as to how profits and losses are to be shared.

383. Where one partner makes advances to the firm he becomes as against his copartners a firm creditor. As a creditor, he has the right to call on the firm and his associates for reimbursement. This reimbursement must be made before his associates are entitled to repayment on account of their capital, for his advancement is regarded as a loan to the firm and not as an increase of its capital.

384. The costs of an accounting are usually paid out of the partnership assets. But if it can be shown that an accounting was necessitated by the fault or misconduct of one of the partners, he will be personally charged with the costs.

(E) A partner's obligations to firm creditors

385. A partner is liable to firm creditors not only to the amount of his contribution and share in the partnership estate, but also to the extent of his separate fortune. This unlimited liability to firm creditors is the greatest burden of the partnership relation. Even though a certain member of a firm is in no way to blame for its failure in business, and the partnership articles provide that his liability for firm obligations shall be limited to the amount which he has contributed to the firm capital, yet he is none the less responsible to firm creditors.

386. Contests sometimes arise between creditors of the firm and creditors of the individual partners. In this case the firm creditors must proceed first against the assets of the partnership, and the individual creditors of each part-

ner must proceed against the separate estates of their respective debtors. If the partnership creditors cannot satisfy their claims out of the partnership assets, and anything remains in the separate estates of the partners after their individual creditors have been paid, the creditors of the partnership are then allowed to go against the separate estates of the partners. Conversely, if the separate creditors have not been paid in full out of the separate estates of the partners, and if the partnership creditors have been paid in full out of the partnership assets, and some partnership assets still remain, the separate creditors are then allowed to satisfy their claims out of the shares of their respective debtors in this surplus. See Section 285.

In re ESTES, 3 Fed. 134 (1880). Estes and Carter, composing the firm of Estes & Carter, were adjudged bankrupts both as partners and individuals. Certain individual creditors of Estes petitioned the court to set aside the proceeds of a sale of real estate belonging to him personally for the payment of their claims. *Held,* where the assets both of the firm and of its members are before the court for distribution, the property of the partnership will be first applied to the payment of firm debts and the property of each partner to the payment of his individual debts.

387. In a few states this rule is slightly modified as follows: (1) In Connecticut, Louisiana, South Carolina, Vermont, and Virginia, firm creditors are entitled to priority over individual creditors in the distribution of firm assets, and also to share equally with the separate creditors of the individual partners in the distribution of the private estates of these partners; (2) in Georgia and Kentucky firm creditors are entitled to priority over separate creditors in the distribution of firm assets, and also, after the separate creditors have received from the estates of their individual debtors a percentage equal to that received by firm creditors from firm assets, to share equally with the separate

creditors in the distribution of the partners' private estates.

QUESTIONS

1. David, Craig, and Carter are partners trading as David, Craig & Co. Carter sells out his interest to Morrill. What rights does Morrill acquire?

2. How are disputes among partners settled?

3. State generally what acts a partner may perform on behalf of the firm. State generally what acts a partner has no implied authority to perform. Is a partnership liable for the torts of one of its members?

4. Smiley and Piper are partners. Piper owes Coleman $500. In satisfaction of this debt to Coleman, Piper gives him an automobile belonging to the firm and purchased by it six months previously for $650. What right has Coleman to the automobile?

5. What is the rule with regard to the taking of secret profits by a partner?

6. A and B are partners for the year 1909, in the practice of law. In February, 1909, A is taken sick and has to go away for a month, and all the work is thrown on B. Is B entitled to extra compensation?

7. Suppose in the above-mentioned case that A had gone away without any good excuse and that B had to do all the work, would he then be entitled to extra compensation?

8. What is the extent of a partner's liability to firm creditors?

9. State the rules with regard to the respective rights of firm creditors and creditors of the separate partners.

10. How are partnership accounts usually settled?

CHAPTER XXIV

THE TERMINATION OF PARTNERSHIPS

388. Following the subdivisions made in the chapters on the discharge of contracts and on the termination of agency, we shall consider the termination of partnerships as caused: *first*, by agreement; *second*, by performance; *third*, by breach; *fourth*, by impossibility; *fifth*, by bankruptcy.

(A) Termination of partnerships by agreement

389. Generally, the duration of a partnership is specified when it is formed. If no time is fixed, the partnership may be dissolved at any time by one member's notifying the others of his intention to withdraw. The withdrawal of one partner dissolves the firm, and if the others continue, a new partnership is formed consisting of the remaining members. In this case the outgoing partner is liable on firm contracts only up to the date of his withdrawal. But see Section 390. If a new partner is taken into the firm, he is liable only on such firm contracts as are made after his admission, unless he expressly assumes liability for those made prior thereto. Where it is desired to wind up the business, usually one of the members is chosen to liquidate its affairs. After all the firm debts are paid the firm assets are divided among the partners in proportion to their respective interests.

390. No matter what the form of agreement which works a dissolution, notice should be given to all persons having dealings with the firm, and to the public generally. In the case of those having business relations with the

partnership, the usual way is to give notice by letter. Notice to the public is also given by advertisement in one or more newspapers published in the place where the firm transacts business. Neglect of this precaution may render an outgoing partner liable as a partner by estoppel for firm debts contracted after his withdrawal to anyone who did not have actual notice of his retirement.

Morrill *v.* Bissell, 99 Mich. 409 (1894). Frank and Murray K. Bissell had been partners and had dealt with Morrill. Murray K. retired from the firm, but notice of the dissolution was not given to Morrill. Morrill, unaware of Murray K. Bissell's retirement, continued to sell goods on the credit of both men just as he had before the dissolution. *Held* that Murray K. Bissell remained ostensibly a partner and liable as such to Morrill for the goods purchased by Frank Bissell after the dissolution.

(B) Termination of partnerships by performance

391. If a partnership is created for the performance of some specified undertaking, it will come to an end upon the completion of that undertaking. Likewise, if the partnership is to last for a definite period, as for one, three, or five years, it will cease at the termination of the prescribed time, unless renewed by express or tacit agreement.

(C) Termination of partnerships by breach

392. Where no time is fixed for the continuance of a firm business, one member may terminate the partnership at any time by notifying the others of his intention to withdraw. Where a time is fixed, it is generally held that an associate may, if he pleases, retire before the end of the period. If he does so, however, he renders himself liable in damages to his fellows, as in the ordinary case of breach of contract.

393. Sometimes when one of the members of a firm has been guilty of grave misconduct, it may be necessary for

his associates to go to court to have the partnership declared dissolved. In general, any serious violation of a partner's duty of loyalty and good faith, as for example, fraud in the original agreement, or refusal to contribute a partner's promised share to the firm capital, is cause for a decree of dissolution.

RISCHE *v.* RISCHE, 101 S. W. (Tex.) 849 (1907). Ulrich H. and Edward Rische had been partners in bottling mineral waters. Ulrich H. sued to have the partnership dissolved, as Edward had wrongfully excluded him from the management and had refused to account to him for profits. *Held* that this was a ground for dissolution. In the absence of an agreement to the contrary, each member of a firm is entitled to participate in the management and profits, and if wrongfully excluded therefrom he may have the partnership dissolved.

(D) Termination of partnerships by impossibility

394. A partnership may be terminated by reason of the death or permanent incapacity of one of the partners. The insanity of a partner does not of itself effect a dissolution, being only a cause for dissolution at the application of the sane partner, or of a representative of the insane partner. If the partners are residents of different countries between which war is declared, so that commercial intercourse is legally impossible, ordinarily the partnership is thereby terminated. In general, any event which makes the continuance of the partnership illegal will dissolve the firm.

JUSTICE *v.* LAIRY, 19 Ind. App. 272 (1898). Justice and Lairy were partners in the practice of law. Lairy accepted an appointment as judge. *Held*, as the laws of Indiana forbade a judge to practice law, the partnership was terminated when Lairy accepted the appointment.

395. It is the duty of the surviving partner to liquidate the firm's affairs. The executor or administrator of the

deceased partner does not become a partner with the survivors, but is only entitled to the decedent's share after a complete liquidation. See Section 371. As the representative of the deceased is not a partner, he has none of the powers of a partner and is subject to none of a partner's liabilities.

396. Even though the executor of a deceased partner, as directed by the decedent's will, permits the latter's share to remain in the business, receiving for the use thereof a portion of the profits, he does not become a partner; nor is the estate of the deceased partner liable for firm debts incurred after his death, beyond the amount invested in the business. But he may become a partner, and subject himself to liability as such by voluntarily taking the place of the deceased partner in the firm.

(E) Termination of partnerships by bankruptcy or insolvency

397. Mere insolvency either of the firm or of a partner does not cause a dissolution. But if an assignment is made for the benefit of the firm creditors without any provision for continuing the business, the firm is dissolved. This is also the case if either the firm or a member thereof goes into bankruptcy. See Sections 284 to 286.

QUESTIONS

1. Enumerate the methods by which partnerships may be terminated.
2. What is the effect of the withdrawal of one partner from the firm?
3. For what firm contracts is an outgoing partner liable?
4. What is the liability of incoming partners?
5. What precautions should be taken upon the retirement of a partner from the firm?
6. Discuss the termination of partnerships by performance.

7. Discuss the termination of partnerships by impossibility.

8. What is the effect of the death of one partner? Of the insanity of one partner?

9. What is the duty of the surviving partner?

10. What rights has the executor or administrator of a deceased partner in the firm effects?

11. What is the liability of the deceased partner's estate?

12. Discuss the termination of partnerships by bankruptcy or insolvency.

CHAPTER XXV

PARTNERSHIPS FORMED UNDER SPECIAL STATUTES

(A) Limited partnerships

398. In the ordinary partnership each member of the firm is liable for its debts to the entire extent of his separate fortune. This liability is so burdensome that legislators, in order to encourage business, have authorized the formation of extraordinary kinds of partnerships in which the capitalist combines his money with the knowledge and skill of others, and limits his liability to the amount originally subscribed. These forms of associations are known as "special" or "limited" partnerships and "joint stock companies." They can be created only under statutory authority. In case of failure to comply strictly with the statute, all the members are usually liable as general partners.

399. A limited partnership is one in which the liability of one or more members, called "special" partners, is limited to the amount which they have respectively subscribed as capital to the enterprise. Usually, a special partner's contribution must be in cash. These special partners do not often take an active part in the management of the concern, and are its agents only in so far as authorized by statute. The others are the "general" partners, and have the same power of control and are subject to the same liabilities as in ordinary firms.

400. A certificate, verified by affidavit, must be prepared and recorded in a public office in the county where

the business of the partnership is to be transacted. This certificate should ordinarily state: (1) The firm name; (2) the name and residence of each partner, and whether he is general or special; (3) the amount of each partner's contribution; (4) the nature of the business; (5) the amount of the capital; and (6) the period during which the partnership is to last.

(B) Joint stock companies

401. A joint stock company is an unincorporated association of persons for business purposes, having a common capital wherein the interest of each member, represented by a stock certificate, may usually be transferred at the owner's pleasure, without causing a dissolution of the company. Such associations have more of the attributes of corporations than of partnerships. Joint stock companies differ from corporations in that they result from a written agreement among the members rather than from the granting of a charter by the public authorities. They differ from partnerships in that the death of one of the members or the transfer of his interest does not put an end to the association. Regulations for governing a joint stock company should be adopted by the associates when it is formed. These are called the articles of association. They should be executed by all the members, and recorded in a designated office in the county where the company transacts business. Only a few states provide for the formation of these companies.

402. The stockholders generally elect the officers and managers at the regular annual meeting. Contracts of the company should be made by one or more of the managers as may be designated by statute. If they exceed the contracting powers so granted them, they become personally liable. Ordinarily, a member of a joint stock company has

no power to represent the company unless duly constituted an officer, manager, or other agent.

403. The only states that have authorized these associations are Michigan, New Jersey, Ohio, Pennsylvania and Virginia, and the statutes of these states are nearly identical. They have carried the resemblance between corporations and joint stock companies to such an extent as to confer on the latter the chief incident of corporate association, namely, limitation of individual liability. These stock companies are sometimes called "partnership associations." In stock companies of this kind the liability of each member is restricted to the amount which he has agreed to contribute as capital to the partnership enterprise.

QUESTIONS

1. Define limited partnerships.
2. Define a special partner. Define a general partner. What are the duties and liabilities of each?
3. What facts should be set forth in a limited partnership certificate?
4. Define joint stock companies.
5. Distinguish joint stock companies and corporations from partnerships.
6. What are the articles of association?
7. How are joint stock companies operated and managed?

CORPORATIONS

CHAPTER XXVI

FORMATION AND POWERS OF CORPORATIONS

(A) The charter

404. A corporation is a legal body consisting of one or more persons, existing by virtue of a grant from a state legislature or from the National Congress. This grant is evidenced by a written instrument, usually called the charter of the corporation or the certificate of incorporation. It has been seen that a partnership is formed by the voluntary agreement of its members. In a corporation, however, in addition to the agreement of the persons forming the corporation, the consent of the state is required. This consent is shown by the charter. The incorporators and other persons who afterwards acquire an interest in a business corporation are called the stockholders. The stockholders choose certain persons as the board of directors to govern and control the corporation. The directors usually choose the president, secretary, treasurer, and other officers to perform certain designated duties in the management of the corporation under the supervision of the board of directors. See Section 471.

405. Corporations are either public or private. Public corporations are such as exist for governmental purposes,

such as cities, boroughs, and the like. All other corporations are private. Private corporations are established either for the sake of profit or not for profit. Corporations for profit are created by private enterprise for pecuniary gain, such as the ordinary commercial or manufacturing companies. Corporations not for profit are those not organized for gain, such as religious, educational, charitable, beneficial, and social corporations.

406. Corporations which supply public utilities, sometimes known as public service corporations, such as transportation companies, gas companies, water companies, and others, are called semipublic corporations. They are created by private enterprise, and developed by private capital. They are public in so far as they serve the public generally, and exercise the public right of eminent domain. See Chapter XXXV.

407. Formerly corporations were created by special act of the legislature. But now, in almost every state, the power of the legislature to form corporations by special act has been taken away, and general laws exist under which a corporation may be formed. Under the general incorporation laws of many states the power of chartering certain corporations is delegated to a judge or other official.

408. Where a corporation is about to be formed under the laws of any state, the procedure is generally as follows: the first step is to prepare an application for a charter addressed to the governor, secretary of state, or some other designated official of the state under whose laws the applicants desire to incorporate. This document usually sets forth the name of the proposed corporation, the purpose for which it is formed, how long it is to exist, the principal place of business, the amount of its capital stock, the names and addresses of the subscribers to the stock, with the amounts subscribed for by each, and sometimes the names and addresses of the directors for the first year. In most

cases the truth of the matters set forth in the application must be verified by affidavit of one or more of the incorporators, of whom one or more may be required to be residents of the state. In some cases public notice by advertisement for a certain length of time of the intention to apply for a charter, and of the purpose for which the corporation is to be organized, must be given. If the application is in regular form, it is approved and recorded in a designated state office, and the authority to form the organization, called the "letters patent," is issued. This, and sometimes also a certified copy of the application, is sent to the incorporators. The incorporators should have the certificate recorded in a county office, and proceed with the organization of the corporation.

409. A meeting of the stockholders for the acceptance of the charter and the adoption of by-laws is usually the next step in the organization of the company. In some states the directors named in the application are directors for the first year; in others a meeting of the stockholders is necessary for the election of directors. Ordinarily, when the directors hold their first meeting they elect the president and other officers for the coming year. When officers have been chosen, the corporation is ready to proceed with business.

(B) The by-laws

410. The by-laws of a corporation are the fundamental private regulations by which it is governed. A corporation has power to make by-laws for its own government, provided they are not inconsistent with its charter or with the laws of the United States, or of the state in which the corporation is formed. The consent of a majority of the stockholders is usually necessary either to the adoption of or to a change in the by-laws.

The following is a typical form of by-laws:

ARTICLE I

MEETINGS

The stated meetings of the board of directors shall be held on the first Tuesday of every month, at their office in Camden, New Jersey, at 4 P.M., except when the first Tuesday of any month shall fall on a legal holiday, when the meeting shall be held on the day following, at the same hour. Special meetings shall be called by the president at the written request of three members.

ARTICLE II

OFFICERS

The board of directors shall elect a president, a vice president, a secretary, a treasurer, a solicitor, and such other officers as may be necessary, at the first meeting after the annual election, or as soon thereafter as may be convenient. They shall hold their respective offices only at the pleasure of the board of directors.

ARTICLE III

THE PRESIDENT

The president shall preside at all meetings of the board of directors; he shall appoint all committees not otherwise ordered by the board of directors, and shall be a member of the same *ex officio*. He shall attend to the executive business, and have charge of the general welfare of the company, under the direction of the board of directors. In the absence of the president, the vice president shall perform his duties.

ARTICLE IV

THE SECRETARY

The secretary shall keep a regular record of the proceedings of the board of directors, give notice to the directors of all stated or special meetings, attend the meetings of all committees, when required, have the custody of the seal of the company, conduct the correspondence, keep the books of the company, and attend to such other proper duties as the president or board of directors may require. He shall give the notice enjoined by law of the annual and special meetings of the stockholders.

ARTICLE V

THE TREASURER

The treasurer shall give bond, with one or more satisfactory sureties, in such sum or sums as the board of directors may from time to time require, for the faithful performance of his duties. He shall keep a separate account in the name of the company in such bank or banks as the board of directors may from time to time designate, and the funds deposited therein shall be subject to drafts or checks, signed by the president and treasurer. He shall make a detailed report of the receipts and disbursements at each stated meeting of the board of directors, and at the stated meeting in January of each year, shall present a complete statement of his accounts for the year ending on the thirtieth day of November previous. His books shall at all times be open to the inspection of the president and board of directors, or any member thereof. All payments shall be made by orders drawn on the treasurer, under appropriations granted by the board of directors, signed by the president and secretary.

ARTICLE VI

CERTIFICATES OF STOCK

Certificates of stock shall be signed by the president and countersigned by the treasurer, authenticated by the seal of the company and countersigned by the registrar of transfers.

All certificates surrendered shall be canceled by the president and treasurer, each of whom shall cancel his own signature, or the signature of his predecessor in office, at the time of transfer. The certificates so canceled shall be examined and reported on monthly by the finance committee.

ARTICLE VII

COMMITTEES

The standing committees, to be appointed annually on or before the first stated meeting of the board of directors, shall be a finance committee, to consist of three members, and an executive committee, to consist of four members. The standing committees shall hold at least one stated meeting per month, and at all meetings

one of the members, or the secretary of the company, shall act as secretary.

The finance committee shall have general supervision of the finances of the company, examine and audit all bills before they are presented to the board of directors for payment, and the certificate book, and report their proceedings to the board of directors at each stated meeting.

The executive committee shall have charge, in connection with the president, of all matters relating to the general welfare of the company.

ARTICLE VIII

ELECTIONS

All elections shall be by ballot, unless by unanimous consent, when a vote may be taken *viva voce*.

ARTICLE IX

OFFICE

The office of the company shall be in the city of Camden, New Jersey, and shall be kept open for the transfer of stock and the transaction of other business, every day (between nine and three o'clock), except Saturday afternoons, Sundays, Good Friday, Christmas, and the fourth day of July, unless otherwise ordered by the board of directors.

ARTICLE X

ORDER OF BUSINESS

At all stated meetings of the board of directors the order of business shall be as follows:

1. A quorum being present, the president shall call the board to order.
2. Roll call.
3. Minutes of the preceding meeting or meetings shall be read, and amended, if necessary.
4. Report of treasurer.
5. Reports of committees.
6. Unfinished business.

7. Written communications read and disposed of.
8. New business.

ARTICLE XI

MEETINGS OF STOCKHOLDERS

The president and board of directors may call a special meeting of the stockholders, by mailing written notices to them at their respective addresses as registered on the company's books, at least twenty days before such meeting.

ARTICLE XII

AMENDMENTS

No alteration or amendment shall be made to these by-laws, unless presented in writing at a stated meeting of the stockholders, to be acted on at a subsequent stated meeting.

(C) Powers of corporations

411. A corporation has only such powers as are conferred on it by its charter. Powers may be so conferred on a corporation: (1) expressly, by being enumerated in the charter; (2) impliedly, because they are incidental to corporate existence, or because they are necessary or proper for the exercise of the powers expressly conferred. The chief powers of a corporation are usually as follows: (1) to have succession; (2) to have a corporate seal; (3) to acquire, hold, and dispose of real and personal property suitable to its purposes; (4) to appoint and remove officers and agents; (5) to make by-laws and regulations for its government; (6) to make contracts in furtherance of the objects for which it was created.

412. The power to purchase and hold such real and personal property as the purposes of the corporation may render necessary or proper is an incident of all corporations, unless specially restricted by their charter or by some

statute. Such power is generally expressly conferred, but this is not necessary, as it is implied in the absence of an express restriction.

413. Collateral to the power to acquire and hold real estate is the power to sell or mortgage property unless restricted by charter or statute. But not all corporations may mortgage or sell their property. Usually a railroad company or other corporation that is vested with the power of eminent domain, and charged with peculiar duties to the public, as telegraph, gas, and water companies, cannot, in the absence of express authority from the legislature, sell, mortgage, or lease property that is essential to enable it properly to perform its functions. See Chapter XXXV.

414. Except in so far as expressly restricted, a private corporation may borrow money whenever the condition of its business renders this action expedient. Therefore, a corporation has implied power to issue, hold and sell negotiable paper if that is the usual or appropriate way of accomplishing the purposes for which it was created.

(D) Ultra vires acts

415. When a corporation assumes to do an act which it has no power to do or in excess of the powers which have been conferred upon it, its conduct is said to be *ultra vires*, that is, beyond or in excess of its powers.

416. If neither party has entered upon the performance of an *ultra vires* contract, the courts will not lend their aid to insure its enforcement.

417. If an *ultra vires* contract has been partly performed by one or both parties, most courts will enforce the contract, if this is necessary to do justice. Suppose that a corporation and an individual enter into a contract under which the corporation agrees to perform acts in excess of its powers, but which are not otherwise illegal. In most

jurisdictions, including Indiana, Michigan, Minnesota, New Jersey, New York, and Pennsylvania, if either party has performed his side of such a contract, the courts will compel performance by the other party should the latter refuse to perform, on the ground that to let the defense of *ultra vires* prevail, would produce an inequitable result.

418. In the Massachusetts and the United States courts it has been held that an *ultra vires* contract is illegal and void, because contrary to public policy. Therefore, even though the individual has performed his part, he cannot hold the corporation liable on the contract. And if the corporation has performed its part of an *ultra vires* contract, the other party may successfully resist the enforcement of the contract by the corporation on the ground that it was beyond the corporate powers. But even in these jurisdictions the rule has been relaxed to the extent of protecting a party ignorant of the *ultra vires* character of the transaction, and in certain other cases.

419. The rule with respect to the *ultra vires* contracts of municipal corporations is different from that prevailing in the case of private corporations. The courts have generally refused to enforce the *ultra vires* contracts of municipal corporations. Notwithstanding the hardship which a strict observance of this principle occasions, such contracts are usually declared to be utterly void.

(E) Promoters and contracts made by them

420. Promoters who have been instrumental in organizing a corporation, and want to be reimbursed for the services rendered and expenses incurred for its benefit, cannot generally recover from the corporation, unless the stockholders or directors, by a resolution regularly passed after the organization has been completed, expressly promise to pay.

421. When people deal with the promoters of a corporation before it is organized, they should remember that the corporation is not bound by contracts to which it is not a party, and the promoters cannot usually be regarded as its agents for the reason that it is not yet formed. In order to secure the benefits of a contract made with promoters before incorporation, one should be careful to have it formally adopted by the company after organization. It will then have the effect of a contract made by the company as of the date of its adoption. Promoters, however, are personally liable on these contracts, unless expressly exempted by the terms thereof.

422. While promoters do not usually occupy the position of agents for the projected corporation so as to bind it by contracts with third parties, yet as between the promoters and the corporation, they are held to occupy a fiduciary relation, and must display toward it the loyalty which an agent owes to his principal. Accordingly, they are sometimes compelled to pay over to the company any profits made by them in transactions which they have entered into on its behalf.

423. The owner of property may be active in the promotion of a corporation, and afterwards openly sell the property to the company at a fair valuation, without violating his fiduciary obligations. But once he starts upon the promotion of a company, he cannot buy property in order to resell it at an advanced price to the corporation and thereby make a secret profit, without being liable to account for the profit which he makes on the resale.

QUESTIONS

1. What is a corporation? What is a corporate charter? Define stockholders. Directors.

2. Define public corporations. Private corporations. Corpora-

tions for profit. Corporations not for profit. Semi-public corporations.

3. Describe the method of forming corporations.

4. Enumerate the usual powers of corporations.

5. The charter of the Seaside National Bank does not confer upon it in express terms the right to acquire and hold real property. Has the corporation the power to purchase a large hotel property, occupy the ground floor as its banking house and lease the rest of the building to a hotel syndicate?

6. What are *ultra vires* acts?

7. What is the rule as regards an *ultra vires* contract which has been partly performed by one or both parties?

8. A, B, and C are engaged in promoting the Ajax Elevator Company. A makes a contract with D to furnish hoists to the company. Who is liable to D for the price of the hoists if they are delivered to and accepted by A? Who is liable to D for the price of the hoists if they are delivered to and accepted by the Ajax Elevator Company after it has been formally incorporated?

CHAPTER XXVII

ADMISSION TO MEMBERSHIP IN A CORPORATION, EXPULSION THEREFROM AND TRANSFER OF INTEREST THEREIN

424. In corporations for profit the term "member" usually means a stockholder. Corporations not for profit generally have no capital stock, membership in them being largely a matter of personal qualifications.

(A) Membership in corporations not for profit

425. Membership in corporations not for profit is usually regulated by the charter and by-laws. The members of a corporation not for profit have the right to prescribe any qualifications for membership which do not contravene state or federal laws or public policy.

426. A member of a corporation not for profit may lose his right to membership therein, and be liable to suspension or expulsion. This sometimes occurs through the violation of the rules of the association, as, for example, through nonpayment of dues. Conviction of an infamous crime is usually a ground for expulsion. It may even be that engaging in a specified business may become a cause for expulsion from a corporation not for profit.

ELLERBE *v.* FAUST, 119 Mo. 653 (1893). Faust was a member of a masonic benefit association. This association passed a by-law providing that if any member became a saloon keeper, he should forfeit his membership and all benefits. *Held* that as Faust kept a saloon after the passage of the by-law, he came within its opera-

tion, and lost his membership in the association without any formal action on its part.

(B) Membership in corporations for profit

427. The capital stock of a business corporation is the money or other property which is put into a fund by those who become members of the concern. It is the means contributed by the stockholders as the basis of the business enterprise for which the corporation was formed. The interest which each member has in the corporation, namely, the right to participate in profits, and upon dissolution to participate in the division of assets, is called a share of stock. Members of business corporations are called shareholders or stockholders. A single stockholder sometimes acquires all the shares of stock without affecting the existence of the corporation.

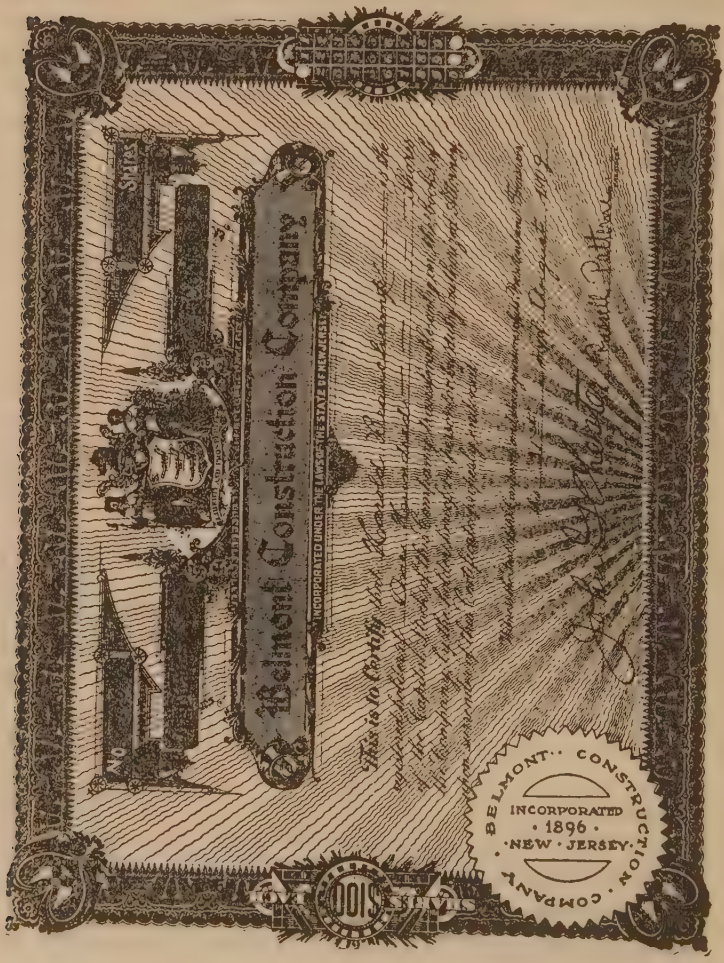
428. Membership in a business corporation, that is to say, the ownership of shares, is usually evidenced by a certificate issued under the corporate seal. When shares are sold, the certificate, together with a power of attorney to transfer it, is delivered to the purchaser, who surrenders it to the company. The company then registers the new owner on its books, and issues a new certificate to him. Sometimes the purchaser of stock omits to have the stock transferred to his name on the company's books. Until transfer is made, dividends and notices of stockholders' meetings will be sent to the former owner.

1. Stock certificates

429. Every stockholder in a corporation is entitled to receive from the company a certificate of the number of shares standing to his credit on the books of the company. This certificate is an acknowledgment by the corporation that the person to whom it was issued is entitled to all the

rights of a stockholder in the company in respect of the number of shares named.

430. The following is a typical form of stock certificate which constitutes evidence of a shareholder's ownership of a certain interest in the corporation:



431. If the registered owner of stock signs the following power of attorney, engraved on the back of the certificate, without filling in the blanks, and delivers such certificate to a purchaser of the stock, the latter ordinarily surrenders the certificate to the transfer clerk of the corporation which issued it. Then this clerk acts as the seller's agent to transfer the stock, and issues a new certificate to the purchaser. The following form shows the power of attorney engraved on the back of the stock certificate which appears in Section 430. This power of attorney is signed in blank, as just explained, by Harold Beauchamp, the person in whose name the stock certificate has been made out:

For value Received _____ hereby sell assign and transfer unto

_____

_____

the Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint _____ Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises.

Dated September 10, 1919.

Harold Beauchamp

In presence of

James Casey

$2 in U. S. revenue stamps, cancelled

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATEVER.

432. When the shares of stock represented by a certificate are pledged, it is usually wiser not to sign the foregoing power of attorney which appears on the back of the certificate, unless the transfer is to be made at once. It is customary for a stockholder who is pledging his stock to deliver the certificate to the pledgee, together with a *separate* power of attorney to transfer the shares. Then when he pays off the loan he gets back the certificate and power of attorney, and destroys the latter, for it has served its purpose. This is better than to have the power of attorney on the back of the certificate signed as indicated in Section 431, because in the latter case the certificate would remain negotiable by delivery, and, if stolen and transferred by the thief to a purchaser in good faith, it would be forever lost to the registered holder, Harold Beauchamp. The purchaser in good faith could have himself substituted as the registered holder of the shares in Beauchamp's place. The form shown on page 227 is a separate power of attorney to transfer stock which might be used in connection with the certificate shown in Section 430.

433. If a stockholder loses his certificate, he may usually have a new one issued to him upon his agreeing to indemnify the company for any loss which may be suffered by the company on account of the former certificate, and upon giving proper security.

2. Voting trusts

434. A voting trust is an arrangement whereby some or all of the stockholders of a corporation transfer their shares in the company to trustees, who have stock certificates made out in their own names as trustees. The trustees then execute to the original owners of the shares "certificates of beneficial interest." In consequence the trustees have the right to vote, and the real owners of the

KNOW ALL MEN BY THESE PRESENTS That I, *Harold Beauchamp*, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto *Arthur Sedley* 100 shares of the capital stock of the Belmont Construction Company standing in my name on the books of the said company, and do hereby constitute and appoint *Arthur Sedley* my true and lawful attorney, irrevocable, for me and in my name and stead, but to his use, to sell, assign, transfer and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney, or his substitute or substitutes, shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the *10th* day of *September, A.D. 1919*.

Sealed and delivered in the presence of

(Signed) HENRY W. CRAWFORD

(Signed) HAROLD BEAUCHAMP. (SEAL)

$2 in U. S. revenue stamps, cancelled

shares have all the other incidents of ownership. In a few states voting trusts have been declared void. In other states it is held that voting trusts are valid, provided they have a lawful object.

(C) Fraudulent issue of stock by the officers of a corporation

435. In some states constitutional or statutory provisions exist to the effect that corporate stock shall not be issued except for work or labor done, or money or property received by the corporation. Under such provisions persons to whom stock is issued for which the corporation receives no value do not really become stockholders in the corporation. This is also true where the corporation issues

more than the authorized number of its shares of capital stock. A subscriber to such an overissue is not liable on his subscription. But if he has paid money for such spurious shares, he may sue the corporation for reimbursement. If the overissued shares pass into the hands of an innocent transferee for value, the corporation is liable in damages to him for the value of the stock.

Rogers *v.* Gladiator Gold Mining & Milling Co., 113 N. W. (S. D.) 86 (1907). The South Dakota Constitution provided that no corporation could lawfully issue stock except for labor done, or money or property actually received. Rogers agreed with the Gladiator Company to help a man named Crabtree in selling the company's stock and in making assays. For these services the corporation agreed to issue certain shares of stock to him. The services having been performed, Rogers sued the Gladiator Company for its failure to deliver the stock. *Held*, the agreement violated the provisions of the State Constitution. Rogers paid the corporation no money or property, and the services performed were rendered to Crabtree individually. Therefore, Rogers could not recover from the corporation.

QUESTIONS

1. How is membership in a corporation not for profit regulated? How may the right of membership in such a corporation be lost?
2. Define capital stock. Define stockholders.
3. Does the ownership by a single individual of all the stock of a corporation terminate the corporate existence?
4. How is membership in a business corporation usually evidenced? Describe the steps taken in transferring stock. Draw a specimen form of stock certificate.
5. What is a voting trust?
6. What is the rule concerning the manner of payment for corporate stock?

CHAPTER XXVIII

THE RIGHT OF STOCKHOLDERS AND OTHER MEMBERS OF CORPORATIONS TO A SHARE OF PROFITS

(A) A stockholder's right to dividends

436. Dividends are profits appropriated by resolution of the board of directors for division among the stockholders. Until dividends are declared, the profits are part of the assets of the corporation, and do not belong to the stockholders individually. Nor is there any debt due from the corporation to them, even though the business is so prosperous that a dividend ought to be declared.

437. The declaration of dividends is largely a matter of discretion on the part of the directors. They will not be interfered with by the courts, unless they act fraudulently or oppressively. Under the laws of most states, even though a corporation has a large surplus fund, the directors may, if they think fit, retain it as a surplus instead of distributing it among the stockholders in the shape of dividends.

McNab *v.* McNab & Harlin Mfg. Co., 62 Hun (N. Y.) 18 (1891). McNab was a stockholder in McNab & Harlin Manufacturing Company, which had a capital stock of $150,000 and a surplus of $152,209. Dividends at the rate of 25 per cent. had been paid for a period of ten years. McNab sued to have all or part of the surplus distributed as a dividend. *Held* that as the surplus was profitably employed by the directors in purchasing materials used by the company in its manufactures, and as they considered it for the company's best interests not to divide this surplus, the directors could not be said to have acted unreasonably or capriciously. Therefore, the court refused to interfere.

438. When the directors have lawfully declared a dividend out of profits earned and received, and the time set for paying the dividend arrives, the stockholders become entitled to payment, and there is a debt due them by the corporation. If the corporation withholds payment of the dividend after it is due, the stockholders may sue the corporation for the amount of the dividend.

(B) The rights of preferred stockholders

439. Preferred stock ordinarily entitles the holders thereof to payment of dividends out of corporate profits before any dividends are distributed among the holders of common stock. Such stock is sometimes called "guaranteed" stock; but this term is inaccurate, as the corporation does not guarantee to holders of preferred stock that it will pay dividends. The rights of preferred stockholders depend upon the contract under which the stock is issued.

440. Preferred stock is of two kinds: (1) where the holders are entitled not only to priority in payment of dividends, but also to priority in the distribution of the principal upon the dissolution of the company; (2) where the holders are entitled to priority over the common stockholders merely in the distribution of dividends. These dividends may be cumulative or non-cumulative. Cumulative preferred stock entitles the holders to receive dividends for the years when the company has paid them nothing, before the common stockholders can begin to share in profits. Holders of non-cumulative preferred stock are entitled only to a preference over the common stockholders in the payment of dividends for the current dividend period (usually a year), without any allowance for the previous times when the company has paid them nothing.

441. Dividends on either preferred or common stock must not be paid out of the company's capital. Holders of

stock of either kind are members of a corporation, and not its creditors, at least so far as respects their shares.

(C) The right to a dividend as between various claimants

442. Usually the person in whose name stock stands when the dividends are payable is entitled thereto. If a stock certificate, which has been delivered to a purchaser prior to the declaration of a dividend, has not been transferred to the purchaser's name, the company pays the dividend to the registered owner, who is bound to turn it over to the purchaser, the real owner. Sometimes when a dividend is declared payable at a later date, stock changes hands between the day of declaration and the day when the dividend is payable. In the absence of any custom or agreement to the contrary, the owner of the stock at the time of the declaration is entitled to it, although it may not be payable until after the sale.

443. Where stock has been pledged but not transferred to the pledgee's name, the pledgor being the registered owner, the corporation will pay dividends to him. If the pledgee has had the stock transferred to his own name, the corporation will pay the dividends to him, but he must account to the pledgor for them.

(D) A stockholder's right to subscribe for new stock

444. When the stock of a corporation is to be increased a stockholder is entitled to preference in subscribing for new stock, unless a statute or other local law provides otherwise. He may demand such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares in existence before the increase.

JONES *v.* MORRISON, 31 Minn. 140 (1883). Jones, Dorilus Morrison and Clinton Morrison were stockholders and directors in

the Minneapolis Harvester Works. While Jones by reason of ill health was absent in Europe, the Morrisons, being majority stockholders, caused a stockholders' meeting to be held on January 3, 1882, at which it was resolved to issue 7,000 shares of new stock and give the existing stockholders the right to subscribe for it before January 24th. At a subsequent meeting of the board of directors, also controlled by the Morrisons, it was resolved that as none of the new stock had been subscribed, the entire issue should be sold to the Morrisons and their friends, which was accordingly done. Notices of these meetings were sent to Jones, but he was in a part of Europe from which he could not have forwarded his subscription within less than eighteen days. As soon as Jones learned of these proceedings, he sued to have them set aside. *Held* that Jones was entitled to an opportunity to subscribe for and take new stock in proportion to the old stock held by him. The Morrisons had known of his absence abroad, and had apparently sought to take unfair advantage of it.

QUESTIONS

1. What are dividends? How are dividends declared? Will the declaration of dividends by the directors be ordered by the courts?

2. What is preferred stock?

3. Hoskins owns twenty shares in the Ragtime Publishing Co. On July 1, 1909, the company declares a semiannual dividend of 2½ per cent. payable to stockholders of record July 15, 1909. On July 2, 1909, Hoskins sells his stock to Cathay. Who is entitled to the dividend?

4. What right has a stockholder upon the issue of new stock?

CHAPTER XXIX

THE RIGHTS OF STOCKHOLDERS AND OTHER MEMBERS OF CORPORATIONS TO CONTROL AND INSPECT CORPORATE AFFAIRS

(A) The right of a member to vote at corporate meetings

445. A stockholder has the right to vote at corporate meetings. The holder of the legal title to shares is the one who may vote them. The stock certificate and transfer books are good, but not always conclusive, evidence as to who has the legal title. In disputed cases, the judges of election determine who is entitled to vote.

446. When nothing appears to the contrary in the laws of the state or the charter of the corporation, each stockholder is entitled to one vote for each share of stock he owns. The statutes of some states, in order to give the minority stockholders representation on the board of directors, confer the right of cumulative voting. If cumulative voting is allowed at elections of directors, each stockholder is entitled to as many votes as shall be equal to the number of his shares of stock multiplied by the number of directors to be elected. He may cast them all for a single director or distribute them among two or more, as he sees fit.

1. Joint owners

447. Where several persons own stock jointly, either in their own right or as fiduciaries, the stock cannot ordinarily be voted unless all agree upon the way the vote shall be cast. But in some states a majority is allowed by statute to vote stock held jointly.

2. Voting by fiduciaries

448. Where one holds stock as a trustee, executor, or administrator, he is entitled to vote thereon.

3. Voting by pledgor

449. In the case of a pledge of stock the right to vote remains in the pledgor as long as the stock stands in his name. When the title is transferred on the company's books to the pledgee, he usually acquires the voting power.

4. Voting by proxy

450. In almost every business corporation the right to vote by proxy is conferred by charter, statute, or by-law. The term proxy usually means a document setting forth the authority granted by a stockholder to his deputy. It is also used to designate the deputy authorized to represent another. The document itself need not be acknowledged before a notary, but should be duly executed and witnessed. The following is a form of proxy in general use:

Know all Men by these Presents:

That I, the undersigned, do hereby constitute and appoint George J. Osborne my true and lawful attorney, with full powers of substitution and revocation, to represent me at the special meeting of stockholders of the Belmont Construction Company, to be held on the 20th day of October, 1927, at 3 o'clock P.M., and do hereby authorize and empower him to vote at said meeting and at any adjournment thereof, for me and in my name and stead, upon the stock then standing in my name on the books of said company, and I hereby grant my attorney all the powers that I should possess if personally present at said meeting.

Witness my signature and seal this 1st day of October, 1927.

[*Signed*] Arthur Sedley, (L. S.)

In the presence of
[*Signed*] Henry P. Thornton

(B) The manner of conducting meetings of corporate members

451. All meetings of stockholders should, as a general rule, be held in the state where the corporation was organized. But when a corporation is chartered by several states, a stockholders' meeting held in one of these states is valid with respect to the property in all of them. The stockholders do not have to hold a meeting in each of the states in which the corporation is domiciled. The laws of some states authorize corporations formed thereunder to hold meetings anywhere.

452. Notice of special meetings should always be given to stockholders of record. Notice of the annual or stated meetings is not always necessary, if the date upon which they shall be held is specified in the by-laws. Stockholders are presumed to be familiar with these provisions, but it is always wise to give them formal notice. The length of notice required is generally stated in the statute or by-laws, and varies from five to sixty days or more. Where the by-laws and statutes are silent on the subject, a reasonable notice is required.

453. When the meeting has regularly convened, the first thing to determine is whether or not a quorum is present. Usually the local statutes, or the charter or by-laws, provide how many shares of stock must be represented in person or by proxy to constitute a quorum. In the absence of such provision a majority of the whole number of shares is sufficient.

454. The meeting is usually called to order by the president or other duly authorized officer. When no presiding officer is designated by the charter or by-laws, the stockholders should proceed to elect a chairman. Someone should also be elected to take the minutes of the meeting.

(C) The business transacted at meetings of corporate members

455. Stockholders' meetings are held for the purpose of having collective action by the stockholders, in order to register the corporate will. As individuals, the stockholders cannot agree to increase the capital stock or to merge with another corporation, or to make other fundamental changes in their organization. For these purposes corporate assent, duly obtained at a stockholders' meeting, is requisite.

456. At a general or stated meeting of the stockholders any legitimate corporate business may be transacted. At a special meeting, however, the only business proper to be transacted is that for which the meeting has been called.

(D) The right of a member to inspect the company's books, and to interfere in the management of its affairs

457. A stockholder usually has a limited right to inspect the books of the corporation at a reasonable time and place, and for a proper purpose. Thus, he may ordinarily inspect the list of stockholders, with a view to canvassing for an approaching election of directors. If he has good reason to suspect fraud on the part of the management, he may generally examine the company's books in order to learn the facts and take proper legal action. The right of inspection includes the right to make copies of the books and records of the company. The corporation may make reasonable regulations governing the manner in which this right shall be exercised, but ordinarily cannot deny it altogether in cases where a stockholder's best interests seem to require an investigation. If the corporation wrongfully refuses to permit a stockholder to examine the books, he may get an order of court to enforce his demands.

458. The principle of majority rule obtains in the management of corporations, and a stockholder merely as such

has little voice in the control of internal affairs. But a single stockholder is entitled to relief where the corporation exceeds its powers or otherwise acts illegally or fraudulently.

Bixler *v.* Summerfield, 195 Ill. 147 (1902). The Story Finishing Company had a capital stock of 300 shares of the par value of $50 each. Bixler owned 58 shares, Summerfield 241 shares, and Hoff 1 share. Bixler charged that Summerfield was voting away the corporate profits for salaries for himself and family. Summerfield was getting a salary of $35 a week, his wife $25 a week for work formerly done for $3.50, and his sister $3 a week for signing her name as secretary to a few letters of notification to stockholders. Moreover, he had reduced Bixler's salary from $15 to $12 a week. Bixler sued Summerfield and Hoff, the majority stockholders, to prevent them from continuing to vote excessive salaries. *Held* that Bixler was entitled to relief. The majority stockholders had evidently acted in bad faith.

QUESTIONS

1. How many votes does a stockholder have? What is cumulative voting?

2. Who is entitled to vote where two or more persons hold stock jointly? Who is entitled to vote in the case of a pledge of stock? What is the right of voting by proxy? Draw a specimen form of proxy for use at a corporate meeting.

3. Where are stockholders' meetings usually held?

4. What notice is required of annual and special meetings?

5. What is a quorum?

6. What is the purpose of stockholders' meetings? What business may be transacted at stockholders' meetings?

7. Gross was a stockholder in the Comet Aeroplane Co. No dividends had been declared for nine years although the company enjoyed a large business. Gross applied to the court for an order on the company to produce its books and papers for inspection, it having denied him the right to examine them. What action should the court take?

CHAPTER XXX

THE LIABILITIES OF STOCKHOLDERS

(A) Liability on stock subscriptions

459. The relation between a corporation and its stockholders is contractual. The contract of subscription fixes the rights and obligations of both parties. The provisions of the statute under which the corporation is formed, whether it is the general incorporation act or a special act of the legislature, are parts of the contract. When a person signs his name to the contract of subscription or articles of incorporation, and agrees to take the number of shares set opposite his name, he is liable for the face value of the stock.

460. The chief incident of corporate membership is limited liability. Ordinarily, membership in a corporation does not entail any liability other than for the amount subscribed. In most cases the liability of stockholders is limited to the par value of the stock for which they have subscribed. In some states a greater liability is imposed by statute. Under the banking laws of the United States, stockholders in national banks are liable for double the par value of their stock.

461. Payment for shares of stock need not be in money, but must be "in money or money's worth." Where payment is made in anything else than money, as services or property, the payment will be held to be valid only where made in good faith, and where an honest valuation is placed on the services or property.

(B) Liability of original subscribers and other stockholders to pay assessments

462. Original subscribers to the capital stock of a corporation are usually bound to pay the face value of the shares. Where a subscription to stock is not payable either at once or at some definite time in the future, the directors may make a demand upon the stockholders for payment of all or part of the unpaid balance by a certain date. This is termed "making a call."

463. Notice of a call ought always to be given to the stockholders. If notice has been duly given, upon the expiration of the prescribed period, interest may be charged against any delinquent stockholder.

464. The corporation may for a sufficient consideration discharge a stockholder from his obligation, provided the rights of creditors are not prejudiced thereby. Unless the obligation is discharged the corporation may, if calls are not paid when due: (1) sue the delinquent holder for the amount of the assessment; or (2) sell his shares to raise what he owes. If the latter course is taken, and the proceeds of the sale are insufficient to pay the amount of the assessment, the corporation still has the right to sue the stockholder for the deficit.

465. The registered owner of stock is generally liable to pay assessments. Where the owner of stock which is not fully paid up transfers it, and the transfer is duly recorded in the company's books, he is not usually liable for subsequent calls in the absence of a charter or statutory provision, or an express agreement.

(C) Liability of stockholders for certain corporate debts

466. In certain states, a greater liability than for the par value of the stock subscribed is imposed by statute. In California and Minnesota, except in the case of corpora-

tions carrying on exclusively a manufacturing, mining, or mechanical business, double liability is imposed by statute. In certain New York corporations stockholders are liable for corporate debts in full.

467. In Indiana, Massachusetts, Michigan, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wisconsin stockholders are liable for wages due employees of certain corporations. To enforce this liability, demand must be made within a specified time. The statutes of many states provide that if any part of the capital stock is refunded to stockholders before the payment of all corporate debts for which such refunded capital stock would have been liable, the stockholders become individually liable to creditors of the corporation for the amounts respectively returned to them. In a few states stockholders are personally liable for all debts of the corporation unless this liability is expressly limited by the charter.

QUESTIONS

1. For what amount is a stockholder liable to the corporation? What is the liability of stockholders of national banks? How should payments for shares of stock be made?

2. What is "making a call"? What notice of a call should be given? What are the rights of a corporation in case calls are not paid when due? Who is liable to pay assessments?

CHAPTER XXXI

THE DIRECTORS

(A) The qualifications of directors

468. Business corporations are usually managed by a president, one or more vice presidents, a board of directors, a secretary, a treasurer, and such other officers and agents as the corporation may appoint. Directors of business corporations may usually act also as officers, and are entitled to receive such compensation for their official services as the by-laws or the board of directors may determine.

469. In the absence of statutory provision or by-law regulation, no particular qualifications are required of directors. The laws of many states require at least one of the directors of a corporation chartered thereunder to be a resident of the state from which the charter was obtained. Foreigners, married women, and even minors, are found on the boards of various corporations.

470. The laws of many states provide that each director of a company chartered thereunder must own at least one share of the company's stock. And even though the laws of a state which charters a concern are silent on this point, the company's by-laws may validly require that each director shall own at least a certain number of shares.

(B) The powers of directors

471. Generally speaking, whatever the corporation can do, in carrying on its business and shaping its policy, can be done, in the absence of a provision to the contrary, by the board of directors acting in their collective capacity. Ordinarily, they may issue corporate stock and make contracts concerning it; make assessments upon stock which

is not paid up; declare dividends; prosecute and settle lawsuits; appoint the president and other officers; mortgage the company's property, and generally direct its affairs.

472. When the number of directors is reduced below a quorum, their power is suspended. In the absence of a provision to the contrary, a majority of the whole number of directors is necessary to constitute a quorum for the transaction of business. Unlike stockholders, directors cannot vote by proxy; therefore, a director who is present only by proxy cannot be counted in making up a quorum. Where the regulations of the company do not prescribe a place of meeting, the choice of locality is within the discretion of the directors. But the directors of Louisiana corporations must hold their meetings in that state.

473. In case of vacancies in the board of directors caused by death, resignation, or removal, the remaining directors are usually, by statute or by-law, empowered to supply the vacancies thus created until the next election. If they fail to do so, the fact that there are vacancies does not impair the validity of their acts as long as there is a quorum. If the directors are not authorized to fill vacancies, a special meeting of the stockholders is sometimes called for this purpose.

Sylvania & Girard R.R. Co. *v.* Hoge, 59 S. E. (Ga.) 806 (1907). The Georgia Code provided that railroads should have not less than five directors. By reason of the death of one of its members, the board of directors of the Sylvania Railroad Company was reduced to four. Hoge and other stockholders sued the railroad and its directors to cause a meeting of the stockholders to be held for the purpose of electing directors, the time for the annual meeting at which directors should have been elected having passed. *Held* that the directors should be ordered to cause a stockholders' meeting to be held. In the absence of any statute or by-law authorizing directors to supply a vacancy in their board, nobody but the stockholders can usually exercise this power.

474. The by-laws generally authorize the delegation of certain powers of the board of directors to committees. A committee may consist of a single member. Only the powers that have been delegated can be exercised by such committees.

COMMERCIAL WOOD & CEMENT CO. *v.* NORTHAMPTON PORTLAND CEMENT CO., 82 N. E. (N. Y.) 730 (1907). The directors of the Northampton Portland Cement Company delegated to an executive committee certain power, subject at all times to the orders of the board. At a meeting of the executive committee an agreement was made with the Commercial Wood & Cement Company to appoint the latter concern the Northampton Company's sole selling agent for a period of five years, although a meeting of the Northampton Company's directors had been called for the afternoon of the same day. The secretary of the Northampton Company promptly notified the Commercial Company that the agreement was under consideration by the Northampton Company's board, and two hours after it had been entered into by the executive committee it was rejected by the board. The Commercial Company thereupon sued the Northampton Company for damages for breach of contract. *Held* that the executive committee had no authority to make such contract. The call for a directors' meeting had suspended the authority of the executive committee. Moreover, the contract being an unusual and extraordinary one, the executive committee was not authorized to make it.

475. As a matter of business precaution, it is advisable to have minutes of all meetings taken. The minutes should contain a full record of all proceedings. In some states the law requires that in certain corporate proceedings minutes of the transactions be taken and preserved, and provides that otherwise the proceedings will be invalid.

(C) The compensation of directors

476. A director of a corporation is not entitled to pay for his services without an express contract or some provision in the charter or by-laws to that effect. As a matter

of fact, directors are rarely compensated for their services commensurately with the ability required and the responsibility involved. In many corporations an honorarium of $5 or $10 is allowed for attendance at each board or committee meeting.

(D) The obligations and liabilities of directors

477. As directors are the unpaid representatives of the corporate members, they are generally responsible only for dishonesty, breach of trust, or gross negligence. When directors act faithfully, keep within the powers given them, and follow the statutes and by-laws, they are not liable for any loss which may occur. They do not insure the success of any action undertaken by the company.

CASE *v.* DELANO, 121 Ill. 247 (1887). Case, a depositor in a bank, sued Delano and the other directors for negligence in permitting the bank to be held out as solvent, when, in fact, it was at the time insolvent. *Held* that Case was entitled to recover. Directors are bound to observe care and diligence and are liable for injuries resulting from their gross negligence. Delano and the other directors had been quite neglectful of their duties, and Case, therefore, had the right to hold them for the damages he had sustained.

478. The position of director of a corporation is a fiduciary one, and therefore the ordinary rules applicable to any fiduciary apply. A director cannot ordinarily represent the corporation in dealings wherein he has a personal and conflicting interest.

479. If the directors of a company declare a dividend when they have reason to know that there are no profits or surplus on hand with which to pay it, so that upon payment the capital is impaired, the directors are generally liable to creditors of the corporation for the amount of the dividend so paid.

QUESTIONS

1. By what officers are business corporations usually managed? Need a director be a stockholder?

2. What are the powers of directors? May they act when their number is reduced below a quorum? May they vote by proxy?

3. May directors delegate their authority?

4. What is the measure of a director's liability?

CHAPTER XXXII

THE PRESIDENT AND THE OTHER OFFICERS

480. The by-laws of the company and the resolutions of the board of directors ordinarily regulate the duties, powers, and compensation of corporate officers. Usually officers have only such powers as are thus conferred upon them. As they are not the general agents of the company, they can bind it merely in so far as they are authorized. Express authority is not in all cases necessary. Authority may be implied from the previous business dealings of the corporation. Where officers assume to do certain acts, and the corporation has in the past repeatedly ratified the performance of similar acts by them, they will generally be held to have the necessary authority.

(A) The president

481. The chief executive officer in most corporations is the president. He generally assumes the supervision of corporate affairs, and sees that the orders of the directors are carried out. The presidents of most companies are either expressly granted extensive powers, or allowed to exercise such powers by general acquiescence. But otherwise, a president's powers are quite narrow.

482. If the president or any other representative of a company exceeds the authority which has been granted to him, the corporation should promptly repudiate his action. It must, when the unauthorized action is disaffirmed, re-

turn any benefits which it has received under such action. It cannot both repudiate the contract and retain the benefits received thereunder.

(B) The secretary

483. The secretary is generally the clerk of the corporation and the custodian of its records. He should take minutes of the meetings of the directors and of the stockholders, and in certain cases of committees. These minutes should be carefully preserved. He is also usually charged with the safekeeping of the corporate seal. He has power to affix the corporate seal to papers authorized to be executed on behalf of the company, and to attest the seal when duly affixed.

(C) The treasurer

484. The treasurer is usually the custodian of the funds and securities belonging to the corporation. In most companies the treasurer takes charge of, or supervises, the books of account. He should be careful as to the bank or trust company in which corporate funds are deposited. In order to be protected, he should have the depository designated by the board of directors.

QUESTIONS

1. What are the duties of the president? What action should the directors take in case the president exceeds his authority?
2. What are the duties of the secretary?
3. What are the duties of the treasurer?

CHAPTER XXXIII

THE CONSOLIDATION AND MERGER OF CORPORATIONS

485. The consolidation and merger of corporations may be effected in various ways. The consolidation of corporations, strictly speaking, is the combination of the respective rights, interests, and franchises of two or more corporations by legal agreement of the stockholders, acting under statutory authority. A merger may be effected through the purchase or lease by one corporation of all the assets of another, or through the acquisition of control by one corporation of another's stock.

486. Statutory authority is always necessary to effect a real corporate consolidation. In most states legislative sanction is given to the consolidation of nearly every kind of corporations. For example, noncompeting railroads may generally consolidate.

487. Where the statutes authorize consolidation they generally provide that the consent of two-thirds or of three-fourths of the stockholders must be obtained. In many states statutory provision is made for the purchase by the corporation of the stock of dissenting shareholders.

488. To effect a valid consolidation, the statute must be strictly followed. The usual procedure is as follows: (1) agreement as to terms by the directors of the consolidating corporations; (2) submission of the directors' agreement to the stockholders of each company at a duly assembled meeting; (3) assent of the stockholders to the directors' agreement by the required vote; (4) filing of certified copies of

the agreement, and the vote in its favor in the same offices in which the original certificate of each of the consolidating corporations was filed.

489. The effect of consolidation under statutory authority is usually to dissolve the old corporations, the combination of which creates a new corporation. This new corporation succeeds to all the rights and obligations of its constituent companies.

490. When a merger is effected by the sale or lease of all the assets of one corporation to another, the latter company usually issues its own stock or bonds to the stockholders of the old company, who thereby become stockholders or bondholders in the purchasing or leasing corporation. A public utilities corporation cannot generally sell out all its property in this manner. But statutes very generally permit public utilities companies, such as railroads, to lease their property to another company, provided such action is authorized by a majority of the stockholders.

491. Another method of consolidation is by uniting in the hands of an individual, a syndicate, or a holding corporation a controlling interest in several companies. This may be done in Delaware, Maine, New York, and many other states under whose laws corporations are authorized to hold stock in other corporations.

492. Over thirty states have limited the combination of corporations by means of anti-trust laws. A " trust " is a combination of corporations or individuals, or both, for the purpose of controlling production with a view to repressing competition and raising prices. Even under the old rules of the common law, most agreements and monopolies in restraint of trade were against public policy, and, therefore, unlawful and void. The Federal Congress has attempted to prevent illegal combinations so far as respects interstate and foreign commerce by passing the Sherman Act of July 2, 1890, and the Clayton Anti-Trust Act and the Federal

Trade Commission Act, both in 1914. Some legislatures are beginning to realize that they have impaired the country's prosperity by their incessant attacks upon corporations, and that it is in many cases desirable to permit the consolidation of companies. The advantages to be gained from doing business on a large scale are obvious, and it is only the occasional abuses of great combinations of capital that should be repressed.

QUESTIONS

1. What is the consolidation of corporations? What authority is necessary to effect consolidation?
2. Must the consent of the stockholders to consolidation be unanimous?
3. What is the usual procedure in the consolidation of corporations?
4. What is the effect of consolidation?
5. What is meant by the merger of corporations?
6. What is a holding company?

CHAPTER XXXIV

CHARTER FEES AND TAXES—REGULATION OF DOMESTIC AND FOREIGN CORPORATIONS

(A) Charter fees and taxes

493. A state may tax a corporation just as it may tax natural persons. Generally speaking, there are three kinds of corporate property which may be taxed: (1) corporation franchises; (2) property held by a corporation, such as lands and money; (3) capital stock in the corporation, either held by the corporation itself or by individual stockholders.

494. The power of a state to tax a corporation is limited to matters which do not come under the exclusive control of the Federal Government. For example, a state may not impose a tax upon a railroad which will amount to a regulation of foreign or interstate commerce. Neither may it tax United States Government bonds.

495. A state may, in the absence of constitutional or statutory prohibition, exempt a corporation from taxation. But such exemption must be clear and unequivocal.

496. Usually two kinds of franchise charges are imposed by a state: (1) the charter fee or organization fee, payable when a company is formed; (2) the franchise tax on corporations, payable annually.

497. An organization fee is the amount of money paid to a state for the privilege of becoming a corporation. A franchise tax is the amount of money paid annually to the state for the privilege of doing business as a corporation.

498. Nearly all the states exact organization fees before the granting of a charter. The states of Alabama, Colorado, Delaware, Maine, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, Washington, and West Virginia impose an annual franchise tax upon the total amount of capital stock issued. In Delaware, New Jersey, and Ohio the amount of taxes is in proportion to the amount of capital stock issued and outstanding. In many of these states, however, certain manufacturing and other companies are exempted from the payment of annual franchise taxes. Many other states impose yearly taxes of various kinds.

(B) Reports required of corporations

499. In almost every state corporations chartered or doing business therein are required to file annual reports in a designated state office, setting forth the condition of such corporations. The matters about which information must be given vary in different states. The following information is required in some states: (1) names and addresses of officers and directors; (2) amount of capital stock authorized and paid in; (3) amount of bonded or other indebtedness; (4) value of real and personal property; (5) name of each member, and number of shares held by him; (6) location of principal office within the state, and name of person in charge thereof.

(C) Registration by foreign corporations

500. The term "foreign corporations" embraces not only corporations chartered by another nation, but also those chartered by another state of the Union. The various states have passed acts prescribing the terms and conditions upon which foreign corporations may enter and do

business. These acts do not differ very greatly. They generally direct that a foreign corporation shall appoint an agent residing within the state, upon whom legal process against the corporation may be served, and shall designate a place of business where he may be found. A certified copy of the charter is also usually required to be filed in a certain state office, and in a local office in the county where its principal place of business is to be located. Moreover, in many states certain fees and taxes are imposed on foreign corporations and they are required to file certain reports.

501. A corporation has no right to go into a state other than that in which it was incorporated and do business there. The recognition of foreign corporations in this respect is a matter largely dependent upon state comity. Therefore, the state may exclude foreign corporations altogether, or impose any conditions upon them before they shall have the right to do business. These conditions must, of course, not be repugnant to the Constitution of the United States. Thus, the right of a state over foreign corporations does not extend to those engaged in interstate commerce which merely send goods through or into the state.

502. It may sometimes be difficult to determine whether or not a foreign corporation has actually entered into a state and transacted business. For example, a corporation chartered in one state may sell goods in another state, by means of correspondence or a nonresident traveling salesman, without doing business in the foreign state within the legal meaning of the words "doing business." In some states it has been held that the making of a single contract within a foreign state does not constitute the "transaction of business" therein. So also under the laws of some states a corporation may rent an office in a foreign state, and put a selling agent in charge thereof, to dis-

tribute samples among its customers, without "doing business" in the foreign state.

503. Various penalties are imposed in different jurisdictions upon foreign corporations which do business without first complying with the provisions of the local statute. In some states the right of a corporation to sue in the courts of the foreign state is withheld until the statute is complied with. In others foreign corporations which have not complied with the local statutes are absolutely forbidden to sue on contracts made before they have obtained a permit to do business. Some other states declare that contracts made by foreign corporations before complying with the local statutes are absolutely void. In other states fines are imposed or the state is given the right to oust the foreign corporation.

QUESTIONS

1. What kinds of corporate property may generally be taxed?
2. How is the power of the state to tax corporations limited?
3. What kinds of franchise charges are usually imposed by the state? Define each kind.
4. What facts are usually required to be set forth in the annual report of a corporation?
5. What is a trust?
6. What legislative attempts have been made to curb trusts?
7. What is a foreign corporation? Describe generally legislation pertaining to foreign corporations.
8. The Consolidated Candy Company was incorporated in the State of New Jersey. It sends its agent, Simpson, into the State of New York to distribute samples and solicit orders. Is the Consolidated Candy Company transacting business in the State of New York so as to make it amenable to the New York statutes regulating foreign corporations?
9. What penalties are imposed upon foreign corporations for doing business in a state without complying with the local statutes?

CHAPTER XXXV

PUBLIC AND SEMI-PUBLIC CORPORATIONS

504. Corporations are either public or private. Public corporations are created by the government for public purposes. Private corporations are usually organized by private individuals. Moreover, there are certain loosely organized governmental districts, not really corporations, which are called *quasi* corporations. "*Quasi,*" a Latin word, means "as if." It is used to denote that two things are similar to each other, but not sufficiently alike to be identical.

(A) Quasi corporations

505. *Quasi* corporations are political or civil divisions of the state, created by statute without the consent of the inhabitants thereof, and invested with particular powers to aid in the administration of the government. These include most counties, townships, and most school districts, road districts, and boards of commissioners, supervisors, or school trustees: in short, most local divisions of the state government other than municipalities. They differ from municipal corporations in that they are involuntary organizations, having no charters, and existing exclusively for purposes of civil government.

506. The most familiar type of *quasi* corporation is the local division known as a county. The towns of the New England states, and the townships of some of the Eastern and Southern states resemble counties in many particulars.

507. The government of a county is intrusted to an official body, which may be a board of supervisors or com-

missioners chosen by the people. The county government has only such powers as are expressly conferred upon it by the statute establishing it as a territorial division for purposes of civil government, or necessarily implied therefrom. Ordinarily, it may exercise the power of eminent domain, by taking private property for public use, without the owner's consent, on making compensation therefor. It may also purchase, hold, and sell real estate, provide for the support of the poor and the maintenance of public schools, contract for the erection and furnishing of public buildings, and generally do any other acts which are necessary and proper for the accomplishment of the objects for which it was created.

508. As the power to borrow money is not implied in the case of most *quasi* corporations, one should not make a loan thereto unless all the proper legal steps have been taken. For example, in order that a county may be bound by contract for any indebtedness, the following conditions must be fulfilled: (1) the county must be authorized by statute to enter into such a contract; (2) if the consent of the people is required, it must be obtained in the manner prescribed by law; (3) the county officers must execute the contract in the manner prescribed by law.

(B) Municipal and other public corporations

509. A municipal corporation is a public corporation created by the legislature for purposes of government, and invested with certain powers of legislation to effectuate the objects for which it was established. Cities are the most common examples of municipal corporations. The Governments of the United States and of the several states of the Union are not municipal corporations. They are self-existing bodies formed of a multitude of persons united by common interest and by common laws. They derive their

powers largely from the consent of the people who compose them. Municipal corporations may be created (1) by the United States Congress; (2) by the state legislatures; (3) by the territorial legislatures when authorized by Congress. Upon the creation of a municipality, a document called the municipal charter is issued to it. Ordinarily this defines the rights, privileges, and powers of the corporation, and establishes its frame of government.

510. Unlike the charters of private corporations, municipal charters are not contracts between the state and the corporation or incorporators. Therefore, unless prohibited by the state constitution, the legislature may increase or decrease the territory of a municipal corporation without the consent of its members, divide the corporation into two or more, or combine two or more corporations into one, amend the charter so as to increase or diminish municipal powers, and even repeal the charter so as to dissolve the corporation.

511. The powers of municipal corporations are of two kinds: (1) public; (2) private. The former are those relating to the governmental powers of a municipality, to which, as a division or agency of the state, are granted certain sovereign powers. These usually include the powers of eminent domain, of promoting public education, of police, and certain other powers exercised by the municipality for the welfare of the community, but for which it receives no consideration. The private powers exercised by a municipality may be roughly grouped together as those from which it derives an income. These usually include, among others, the power to erect and maintain gas, water, and electrical plants, and other works of public utility.

512. While municipalities constitute the majority of all public corporations, there are other corporations of this kind. Thus, if a school district is granted a charter, it is a public corporation, although not a municipality.

(C) Semi-public corporations

513. Semi-public corporations are private corporations performing public functions, supplying public utilities, or operating under municipal franchises. These include the following: bridge, canal, and ferry companies; electric light and power companies; gas, water, and sewer companies; railroad, street railway, turnpike, and navigation companies; telegraph and telephone companies; pipe-line, grain elevator, and irrigation companies, and many others. Semi-public corporations, being created primarily for the private profit of their members, are essentially private corporations. They have all the powers and incidents of other private corporations, and are owned by their stockholders and managed by their directors and officers in much the same way.

514. Many semi-public corporations, such as railroad companies, are given the right of eminent domain. See Section 507. Many of them, such as street railway companies, use the public highways. In view of such special privileges, and of the fact that they are formed to earn a profit by serving the general public, they are subject in a high degree to public regulation and control, in order that the public interests may be protected. For example, the legislature may compel semi-public corporations so to conduct their business as not to impose unreasonably high charges on the public, or unnecessarily to expose it to harm or danger.

Wilcox *v.* Consolidated Gas Co., 212 U. S. 19 (1909). The New York State Legislature by a law passed in 1906 limited the price to be charged for gas to 80 cents per 1,000 cubic feet. The Consolidated Gas Company asked that the Public Service Commission be restrained from carrying out this law. *Held* that the law was reasonable. Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used. Six per cent. is a fair

return on the value of property employed in supplying gas in the City of New York, and a rate yielding that return is not confiscatory. In the absence of proof that the 80 cent gas law would yield the Consolidated Gas Company a less return than six per cent. on its investment, the Public Service Commission would not be restrained from enforcing the law.

QUESTIONS

1. Enumerate the kinds of public corporations.
2. What is a *quasi* corporation?
3. How is a county governed? What powers has the county government? What conditions must be fulfilled in order that a county shall be bound by any indebtedness?
4. What is a municipal corporation?
5. How are municipal corporations formed? What is a municipal charter? Is the municipal charter a contract between the state and the corporation?
6. Enumerate the kinds of powers possessed by municipal corporations. Define and illustrate each kind.
7. What is a semi-public corporation? Illustrate. How far are these corporations to be deemed really public corporations?
8. What is the extent of the legislative control over semi-public corporations?

CHAPTER XXXVI

THE TERMINATION OF CORPORATIONS

515. The termination of agency and of partnerships has been treated under five subdivisions, which will be followed in considering the termination of corporations. The dissolution of a corporation may be caused: *first*, by agreement; *second*, by performance; *third*, by breach; *fourth*, by impossibility; *fifth*, by bankruptcy or insolvency.

(A) Termination of corporations by agreement

516. The dissolution of a corporation may be effected by the voluntary surrender of the powers or franchises granted in the corporate charter, if the surrender is accepted by the state. But in the case of strictly private corporations, which have no public duties to perform, the consent of the state is not necessary. The state cannot compel a private corporation to remain in existence, and such a corporation may dissolve itself by the consent of its members.

517. In most business corporations the unanimous consent of all the stockholders is not necessary to a surrender of its privileges. Usually the majority of the stockholders may, in the exercise of a sound discretion, decide to wind up the business even against the will of the minority. In New Jersey the General Corporation Law allows the directors to dissolve the corporation, provided two thirds in interest of all the stockholders shall assent thereto at a meeting called for this purpose.

518. The statutes of nearly every state provide what steps shall be followed in winding up a corporation by agreement. In order to be secure the provisions set forth in the statute should be strictly followed.

(B) Termination of corporations by performance

519. Where a corporation has been expressly chartered merely to put through a certain piece of work, its activity will be terminated on the performance of that work. Or, if a certain period has been fixed for the corporate existence by its charter or a local statute, it will come to an end at the expiration of that period, unless its franchises are renewed. In most states provisions are made for continuing, under certain conditions, the existence of corporations whose charters are about to expire.

(C) Termination of corporations by breach

520. The termination of a corporation may be effected by an abuse of the powers granted to it, or by the failure to exercise them. Either of these causes is a ground for a proceeding by the state to have the corporate charter forfeited.

People *v.* North River Sugar Refining Co., 121 N. Y. 582 (1890). The North River Sugar Refining Company agreed with certain other refiners of sugar to select a board of trustees, and to turn over to this board the stock certificates representing the ownership of all the companies. The refineries were to be managed and operated by the board for the common benefit. Profits and losses were to be shared in certain proportions. *Held*, this was a consolidation for the purpose of creating a "trust" unlawful and injurious to the public interest. It was, therefore, ground for an action by the attorney general in the name of the state to have the corporation dissolved and its charter forfeited. See Section 492.

(D) Termination of corporations by impossibility

521. The dissolution of a business corporation is seldom effected by impossibility. Even if all the stockholders in a business corporation were to die at the same time, their shares would pass automatically to their executors or administrators, and the corporate existence would be uninterrupted. But if a statute is passed which makes it unlawful for the corporation to continue doing the business for which it was chartered, there is usually nothing left but to dissolve the company.

(E) Termination of corporations by bankruptcy or insolvency

522. Neither insolvency nor the appointment of a receiver necessarily brings about the dissolution of a corporation. But these things generally lead in the end to its dissolution. See Chapter XVIII.

523. When a corporation has become involved in litigation as a result of financial difficulties, and there is danger that the corporate property may be lost or misapplied, receivership proceedings are generally instituted. A receiver is a person appointed by a court to take charge of and administer the corporate property under the court's direction for the benefit of the creditors, stockholders, and other persons who are ultimately entitled thereto. Receivers are officers of the court and must account to it.

524. The courts usually have power to appoint receivers when, in the exercise of their discretion, they deem such appointment necessary. This power may be exercised in the following emergencies: (1) in case of insolvency; (2) in case of mismanagement and misapplication of the corporate funds by the officers or directors; (3) to protect creditors when they have been unable to satisfy their claims by means of the ordinary legal process.

525. The appointment of a receiver usually has the effect of making it impossible for the corporation to exercise certain corporate powers; because as a rule the decree appointing a receiver gives him custody and control of the property belonging to the corporation. But any corporate powers which are not conferred upon the receiver may, as a rule, still be exercised by the corporation. When the receivership is terminated ordinarily the company may resume the powers which it had prior to the appointment of the receiver.

526. The powers of receivers are fixed by statute in many of the states. Where the local statutes do not define their powers, they have only such as the court may confer upon them. Generally a receiver succeeds to all the rights that the corporation had before his appointment. So also any defenses to claims which were good against the corporation before he was appointed may ordinarily be set up in an action brought by him as receiver, to enforce such corporate claims.

QUESTIONS

1. Enumerate the methods by which corporations may be dissolved.

2. Is the consent of the state necessary to the dissolution of a private corporation? Is the consent of all the stockholders necessary to the dissolution of a private corporation?

3. Discuss the termination of corporations by performance.

4. For what causes will the state forfeit the corporate charter?

5. Discuss the termination of corporations by impossibility.

6. Who is a receiver? When will a receiver be appointed and by whom? Does the appointment of a receiver terminate the corporate existence? What is the effect of the appointment of a receiver?

BOOK THIRD

PERSONAL AND REAL PROPERTY

PERSONAL AND REAL PROPERTY

CHAPTER XXXVII

THE VARIOUS KINDS OF PROPERTY AND THE ACQUISITION AND TRANSFER THEREOF

527. Property is the right which one man has to hold and dispose of certain real or personal estate as he may see fit, to the exclusion of all other persons. The word "property" is derived from the Latin word *proprius,* meaning " one's own." All things are not the subject of property. A person cannot appropriate the sea or the air so as to acquire an exclusive right of property in either of them.

528. Property is of two kinds: (1) real; (2) personal. Real property or real estate is usually permanent, fixed, and immovable, such as land, structures thereon, fixtures thereto, and rights issuing out of, annexed to, or exercisable within land. Personal property, which consists for the most part of goods and chattels, is usually movable, so that it may be carried about by the owner from place to place. Books, merchandise, mortgages, and bank notes are familiar kinds of personal property.

529. In this third book we shall consider contracts affecting property and the various kinds of property rights. These rights may be obtained in two ways: (1) by original acquisition; (2) by transfer.

(A) Original acquisition of property

530. We shall treat of the original acquisition of property as made: (1) by occupancy; (2) by accession; (3) by intellectual labor.

1. By occupancy

531. The title to most lands is derived from our national, state or colonial governments, and the question of title by occupancy merely is unimportant. But the continuous, exclusive, notorious and unopposed occupancy of another's land in hostility to his rights will finally give the occupant title. Usually the period of twenty or twenty-one years outlaws the true owner's claim.

Overfield v. Christie, 7 S. & R. (Pa.) 173 (1821). In 1788 Nathan Abbott settled on certain ground, which he improved and sold to Lazarus Ellis, who afterwards sold it to Peter Osterhout. After Osterhout's death, his widow and son were sued by Overfield, who claimed under a grant from the State of Pennsylvania in 1784. *Held*, even though Abbott was originally a trespasser, the exclusive and notorious possession maintained by him and his successors for over twenty-one years, in hostility to the real owner's rights, ripened into title. The various periods, during which Abbott and his successors had occupied the land, could be added together in order to make up the required total of twenty-one years.

532. Formerly goods captured in time of war from an alien public enemy were held to belong to the captor. But now they are held to belong to the nation with whose army the captor is fighting, and he has only such interest in them as that nation's laws prescribe.

533. If the owner of personal property loses it, the finder is entitled to it as against everyone but the owner. The finder's title will become perfect if he is unable to discover the owner. But the finder of a lost article is not entitled to a reward from the owner for returning it if none has been promised. Neither has he a lien on the property for the value of his services in keeping it. He must deliver it to the owner on demand.

534. If the owner of personal property abandons it, showing clearly his intention to relinquish his ownership, the finder thereof will have a perfect title.

2. By accession

535. Accession is defined as the right to all that one's property produces. This includes the crops yielded by land and the increase of animals. Under this head we should also mention the increase of real estate by the addition of portions of soil gradually washed up by the sea or deposited through the operation of other natural causes. The deposit itself is called alluvion. The act by which the deposit is added to the soil is called accretion, which comes from the Latin verb *accrescere*, to grow to. Generally the owners of lands touching on water acquire by virtue of their riparian rights any gradual accretions to the land brought about by the operation of natural causes.

3. By intellectual labor

536. By statute the right to the exclusive use for a limited time of their original works and inventions is secured to authors, composers, and inventors. A patent is a grant by the state of the exclusive privilege of making, using, and selling an invention, and of authorizing others to make, use, and sell it for seventeen years. A copyright is a grant by the state to authors of literary or artistic productions of the exclusive privilege of making, publishing and selling, and authorizing others to make, publish, and sell their productions for a period of twenty-eight years. Both of these matters are under the control of the Federal Government.

(B) Transfer of property

537. Title to personal property may be acquired by transfer in two ways: (1) by act of the law; (2) by act of the parties.

1. Transfer by act of the law

538. Title derived by act of the law occurs in four different ways: by forfeiture, judgment, bankruptcy, or intestacy.

539. Formerly a man might forfeit his title to property in numerous ways, such as murder and outlawry, but today forfeiture is incurred most often through violations of the so-called prohibition laws.

540. Title by judgment occurs as a result of a decree entered in a lawsuit whereby one man becomes entitled to take property formerly belonging to another. This may be by means of a judgment by which title to a specific article which was possessed by A is declared to be transferred to B.

541. Title by bankruptcy occurs where by operation of law a bankrupt's property is transferred to representatives appointed to distribute it among his creditors. See Chapter XVIII.

542. Title by intestacy occurs where a person dies without having made a will, and his property is distributed among his relatives in accordance with the intestate law. See Chapter LX.

2. Transfer by act of the parties

543. The transfer of property by the act of the parties may occur in the following three ways: (1) by a contract of sale or exchange; (2) by means of a gift during the owner's lifetime; (3) by means of a will, which takes effect at the death of the owner of the property affected by it.

544. A sale is a transfer whereby one party passes title to property to another for money paid or promised to be paid. See Chapters XLI to XLIV.

545. An exchange or barter is a contract by which one party passes title to property to another in consideration

of the transfer to him of certain other property. See Chapter XLI.

546. A gift is a transfer of title to property by one person to another without any consideration and out of the giver's bounty.

547. A transfer of title to property by will takes place when a person, usually by means of a written instrument, designates who shall own his entire property or certain parts of it after his death. See Chapter LXI.

548. In addition to the above mentioned means of acquiring ownership of property, it should be noted that it is possible for a man to acquire a special interest in property without becoming the owner thereof. For example, A may give B the use of A's property for a certain time. In this case, while A has the right of ownership in the property, B has the right of possession. The right of possession of real property is transferred by means of leases. See Chapter XLVI. The right of possession of personal property is transferred by means of bailment contracts. See Chapters XXXVIII and XXXIX.

549. The above mentioned methods of acquiring title to personal property will be discussed under their appropriate heads. Part I of Book Third will deal with the acquisition of a special kind of property in personal estate by means of bailments. See Chapters XXXVIII and XXXIX. And with the transportation of personal property. See Chapter XL.

QUESTIONS

1. Define property. How many kinds of property are there? Define each kind. How may rights of property be obtained?

2. Enumerate the various methods of original acquisition of property. Explain each.

3. A is a chimney sweep and is engaged in cleaning the chimney of B's house. He finds in the chimney place a valuable jewel of which B had no knowledge. As between A and B who is entitled to the jewel?

4. What rights are secured by statute to authors and inventors?

5. What are the two methods of transferring title to personal property?

6. Enumerate the methods of transfer by acts of the law. Define each method.

BAILMENTS, INCLUDING CONTRACTS FOR PLEDGING, HIRING, AND TRANSPORTING PERSONAL PROPERTY

CHAPTER XXXVIII

THE DEFINITION OF A BAILMENT, AND THE VARIOUS KINDS THEREOF

550. A bailment is defined as a delivery, by one party to another, of personal property which is to be held in accordance with the purpose of the transaction, and is to be returned or otherwise disposed of when that purpose is accomplished. The word "bailment" is derived from the French *bailler*, meaning "to deliver." It conveys the idea of delivery of possession of personal property without transfer of ownership. In a bailment the person who transfers the possession of the personal property is called the "bailor," and the person to whom the possession is transferred is called the "bailee."

551. Bailments are of three kinds: (1) for the sole benefit of the bailor; (2) for the sole benefit of the bailee; (3) for the benefit of both bailor and bailee.

552. A bailment for the bailor's sole benefit may occur when A delivers personal property to B who is to take charge of it or is to perform some other service in con-

nection with it merely for A's advantage and without reward.

553. A bailment for the bailee's sole benefit occurs in the ordinary case of a friendly loan of a book, an automobile, or other article of personal property. Here the bailee has the use of the thing bailed and is to return it to the bailor without giving him any compensation therefor.

554. The ordinary business bailment falls under the third head, where both bailor and bailee derive reciprocal advantages from the contract. When a man delivers cloth to a tailor to be made up into a suit of clothes, the bailment is one for the benefit of both parties. The bailee receives pay for his labor and services, and the bailor receives back his property enhanced in value.

555. Bailments for the benefit of both bailor and bailee are exemplified in contracts of pledging and of hiring. A pledge or pawn is a bailment as security for the performance of some undertaking, ordinarily accompanied by a power to sell the thing bailed in case of nonperformance. A contract of hiring is a bailment whereby the bailee becomes entitled to the use of the thing, the time, purpose, and consideration being usually specified in the contract.

556. When a common carrier contracts to transport a person's goods from one point to another, the bailment is for the benefit of both parties. This is also the case with warehousemen, commission merchants, factors, and other agents who perform services involving the transportation, custody, forwarding, or sale of other people's goods. Common carriers, being bailees of a special kind to whom particular rules of law apply, are considered separately in Chapter XL.

QUESTIONS

1. Define bailment. Bailor. Bailee. How many kinds of bailments are there? Define and illustrate each kind.

2. What is a pledge?

3. A leaves his watch with a watchmaker to be repaired. What is the legal name for this transaction?

4. A intrusts a book to B who undertakes to sell it for A without reward. What is the legal nature of this transaction?

CHAPTER XXXIX

THE RIGHTS AND OBLIGATIONS OF BAILORS, BAILEES, AND THIRD PARTIES

557. In a bailment transaction the bailee is under immediate obligations to the bailor who has delivered the property for a certain purpose. The bailee's obligations to third parties are not often of great importance. The bailor's obligations are principally to the bailee. His obligations to third persons are of comparatively slight consequence. Third parties do not generally figure largely in bailment contracts, which usually contemplate only a relation between the bailor and the bailee respecting the former's property. The bailee is not so much an agent as an independent principal, contracting for himself.

(A) The bailee's obligations toward the bailor

558. The obligations of the bailee toward the bailor depend upon the nature of the bailment. In the case of a bailment for the bailor's sole benefit, the bailee is not liable for failing to undertake the bailment. He is held only to the exercise of a slight degree of care. Once he accepts property as a bailee without hire, he is responsible only for gross negligence in the performance of the bailment.

SMITH *v.* ELIZABETHPORT BANK, 69 N. J. L. 289 (1903). Smith was administrator of the estate of Peter Wyckoff. Wyckoff had delivered three government bonds to the bank for safe-keeping. For this Wyckoff was to be charged nothing. The cashier deposited them in the vault, which was open during business hours. They were stolen by a trusted employee, and Smith sued the bank to

recover their value. *Held*, as the bank was a bailee without hire, it was not liable for the value of the bonds in the absence of proof that it was grossly negligent.

SPRINKLE *v.* BRIMM, 144 N. C. 401 (1907). Brimm, as United States Collector, sold three kegs of brandy to Sprinkle. The brandy could not be shipped that day as Brimm had no revenue stamps, but he said that he would get them and promised Sprinkle that he would, without charge for his services, ship the brandy to a party in Kentucky and send Sprinkle the bill of lading. Sprinkle paid for the brandy and the stamps. Brimm put the brandy on a dray which was to go to the railroad station, but did not see that it was properly shipped. Neither did he send Sprinkle the bill of lading. The brandy was never delivered, and Sprinkle sued Brimm to recover the money he had paid. *Held*, Brimm was grossly negligent in not living up to his agreement. Therefore, even though he was only a bailee without hire, he would have to make good Sprinkle's loss.

559. In the case of a bailment for the sole benefit of the bailee, it is his duty to take extraordinary care of the thing bailed, and he is liable to the bailor for losses resulting even from slight negligence. He must not use the property in any other way than that agreed upon, and must return it when the object of the bailment has been accomplished. Ordinary expenses, incidental to the use of the thing loaned, such as feeding cattle or domestic animals, must be borne by the bailee. He is entitled to reimbursement from the bailor, however, for any extraordinary expenses necessarily incurred in preserving the property.

ROSS *v.* SOUTHERN COTTON OIL CO., 41 Fed. 152 (1890). Ross loaned his barge to the Southern Cotton Oil Company, which used it for a different purpose from that for which it was loaned. While being so used the barge was sunk. Ross sued his bailee to recover for the damage done. *Held* that the oil company was liable. It was merely a bailee without hire, and, having put the barge to another use than that agreed upon; it was liable for any loss or damage,

although the barge might have been sunk by some unforeseen chance and without the bailee's negligence.

560. In the case of a bailment for mutual benefit, the bailee is bound to exercise ordinary or reasonable care under the circumstances. He is liable to the bailor for losses occasioned by his neglect of this duty. Failure on the bailee's part to be as careful of the property bailed as he would be of his own property is an indication of negligence. In the case of common carriers, treated in Chapter XL, a specially heavy liability rests on the bailee.

HUNTER *v.* RICKE BROTHERS, 127 Ia. 108 (1905). Ricke Brothers ran a livery stable. Hunter left his horses with them to be cared for overnight. During the night a fire of unknown origin destroyed the stable and its contents. Hunter sued Ricke Brothers for the value of the horses. *Held*, as this was a bailment for mutual benefit, Ricke Brothers were bound to use ordinary care. In the case of such bailments, upon the destruction of the bailed property the bailee must generally show that it was not due to any lack of care on his part. But here the loss was apparently caused either accidentally or by an incendiary. The bailee's own property was burned along with the bailor's horses, and in order to recover the bailor must prove that the bailee's want of care helped to cause the loss. As he did not prove this, Hunter could not recover.

561. If the bailee is guilty of any improper use of the bailor's goods, he is liable for the resulting loss. It is his duty to act in good faith. He cannot, therefore, unless authorized by the bailor, sell or pledge the thing bailed or deal with it in any other way than that contemplated by the bailment.

562. The relation of bailor and bailee is one of trust, and the former's rights are usually not extinguished by the passage of time, as in the case of the outlawry of most obligations. Usually in order for him to lose his right to the thing bailed by lapse of time, he must have demanded the

return of his chattel, and, after refusal by the bailee to deliver it, delayed taking action for the statutory period.

(B) The bailee's obligations toward third parties

563. As respects third persons, a bailee does not incur any special obligation. If, however, he deceives them by pretending that he is the absolute owner, he is liable to them for the consequences of such false pretenses. Ordinarily, the bailee's obligations are owing to his bailor. But if his bailor does not really own the goods, the bailee is liable in case he refuses to deliver them to the true owner upon demand or returns them to his bailor.

Doty *v.* Hawkins, 6 N. H. 247 (1833). Clorinda Doty owned a cow, two sheep, and a lamb. Her father, Daniel Doty, without any authority, sold and delivered them to G. & E. A. Webb, who turned them over to William Hawkins for safekeeping. Clorinda Doty notified Hawkins that the animals were her property, and demanded them of him. Hawkins said that he had no doubt the animals were hers, but that she must go to the Webbs. She then sued Hawkins. *Held*, Hawkins was liable. The true owner having notified him of her claim, he was bound to restore the property to her, or to pay her its value.

(C) The bailor's obligations toward the bailee

564. Except in the case of a gratuitous bailment, the principal duty owing by the bailor to the bailee is that of compensating him for his services. In most bailments the bailee performs some service for the bailor, the compensation for which may have been fixed in the contract, or left unsettled with the understanding that it was to be a reasonable reward for the undertaking.

565. Where the bailee is entitled to remuneration, he generally has also the right to retain the bailor's property as security for the payment of his services in connection with it. This right is called a lien, and is implied by law

in the case of most bailments where the bailee is to be compensated. Bailees' liens are of two kinds: (1) *particular*, which is the right to retain the property of another on account of services rendered or money expended in connection with the bailment in question; (2) *general*, which is the right to retain the property of another on account of a general balance due from the owner. Unless otherwise agreed, a bailee's lien is usually only particular.

Owen *v.* Duhme, 3 Ohio Dec. 303 (1858). Owen bought a watch from Duhme, paying part of the purchase price and getting credit for the balance. Afterwards he left the watch to be repaired. When he called for it he was told he could not have it unless he paid the rest of the purchase money. Owen sued for the return of the watch. *Held*, when Duhme received the watch back for repairs he was a bailee, and after being paid for the repairs he could not hold the watch as security for the payment of any other debt due by Owen. Therefore, Owen was entitled to his watch.

Firth *v.* Hamill, 167 Pa. 382 (1895). Firth & Foster Brothers had dyed clothes for Hamill for several years. On their bills, invoices, and other business stationery appeared this notice, "All goods received only upon condition that they are subject to a general lien, not only for the dyeing and finishing thereof, but also for the balance of any former amount due." Hamill disputed the right of Firth & Foster Brothers to hold certain goods for anything but the charges due on those same goods. *Held* that as Firth & Foster Brothers had a general lien, they could hold the goods for all sums due them. One who is not bound by law to receive bailments may stipulate the conditions on which he will take another's property, and Hamill had every reason to know that Firth & Foster Brothers received the goods subject to a general lien.

566. In order that a bailee may assert a lien against property, it must usually be in his exclusive possession. Possession is essential to the existence of a lien, and, therefore, if the bailee voluntarily parts with the possession, he loses his lien. He may also waive his right to a lien and

make himself liable as a wrongdoer by dealing with the goods as his own, or by a general refusal to deliver them up without stating that he retains the goods for the amount of the lien.

Hurley & Smith *v.* Epps, 69 Ga. 611 (1882). Hurley & Smith had a lien for some repair work on a buggy. They permitted the sheriff to seize the buggy on another person's judgment against the owner without notifying him of their claim. Later they sued to establish their lien. *Held,* by allowing the sheriff to take possession of the buggy without asserting their claim, they had lost their lien.

(D) The bailor's obligations toward third parties

567. Bailment contracts do not ordinarily bring the bailor into legal relations with third parties. The bailor is not liable to third persons for injuries resulting from the bailee's negligent use of the property. For this reason it is in many cases more desirable for the owner of property to create a bailment rather than an agency relation.

Felton *v.* Deall, 22 Vt. 170 (1850). Deall hired her ferry boat for a year to a man named Hobbie. By reason of Hobbie's negligent management of the boat Felton was injured. He sued Deall. *Held* that Deall was not responsible for the negligence of her bailee.

(E) Obligations of third parties toward the bailor

568. The bailor does not lose his title to the property by transferring the possession to a bailee. He may, therefore, sue third parties for interfering with the bailee's possession or for any damage to the thing bailed. So also if a bailee, in violation of the terms of bailment, sells the property to a third person who purchases in good faith and in ignorance of the bailor's rights, the bailor is usually entitled to the property as against the third person and anyone claiming under him.

Ingersoll *v.* Emmerson, 1 Ind. 76 (1848). Ingersoll owned the canal boat *Gideon,* which he lent to Gideon Halloway in order that Halloway might operate the boat on the Ohio Canal and apply

the profits to the payment of a debt owing by Halloway to him. Halloway sold and delivered the boat to Emmerson. When Ingersoll learned of this, he sued Emmerson to recover the boat. *Held,* Ingersoll should get his boat, for Halloway was a bailee for a particular purpose, and could not, in disregard of that purpose, sell the property even to a purchaser in good faith without notice of Ingersoll's rights.

(F) Obligations of third parties toward the bailee

569. The right of the bailor of personal property is that of ownership. The right of the bailee is that of possession. The bailee's right of possession enables him to sue a third party who maliciously or negligently injures the property while in his charge. Thus he may sue if the property is lost or injured through the negligence of a common carrier or innkeeper, or if it is wrongfully appropriated by a third person. He may recover not only for the damage which he suffers by reason of being deprived of the full use of the article, but also for all injuries caused to the property. The amount recovered by him in excess of his own interest he should hand over to the bailor.

Gillette *v.* Goodspeed, 69 Conn. 363 (1897). Gillette borrowed a horse and wagon with which he embarked on Goodspeed's ferryboat. The horse and wagon were destroyed, and Gillette sued Goodspeed for their full value. *Held,* if Gillette could prove that Goodspeed was negligent he could recover the full value of the property. But he could keep only enough to repay the loss suffered by himself as bailee, and must account to the owner for the balance.

QUESTIONS

1. To what degree of care is a gratuitous bailee held? For what is he liable?

2. Watts, a saloonkeeper, is about to move to a new location. Hildreth, a friend, undertakes to move his stock of liquors for him without pay. Some of the goods are injured without Hildreth's fault. Is Hildreth liable to Watts for the goods so damaged?

3. What is the liability of a bailee when the bailment was for his exclusive benefit?

4. Sweeney lent Lee his horse and buggy to drive to Hilltown. Instead of going to Hilltown Lee went to Maybury. On the journey home the horse and buggy collided with an automobile and the horse was killed. Is Lee liable for the value of the horse?

5. To what degree of care is a bailee held where the bailment is for the benefit of both parties?

6. Ferguson left a suit of clothes with his tailor Wilson to be cleaned and pressed. While pressing the clothes Wilson burnt the trousers with an iron so that it was impossible for Ferguson to wear them. Can Ferguson recover the value of the trousers from Wilson?

7. How can the rights of the bailor be outlawed?

8. Wagner lent his automobile to Schaffer. Schaffer represented to O'Brien that he owned the automobile and sold it to O'Brien for $1,000. Can Wagner recover the automobile from O'Brien?

9. Define a lien. How many kinds of liens are there? Define and illustrate each kind.

10. Graham left his horse with Clay, a farrier, to be shod. After Clay has shod the horse he delivers him to Graham's agent, Donovan, who does not pay for the shoeing. Has Clay a lien on the horse for his services?

11. The Eastern Railroad Company hires a horse and carriage to McCormick by the day. McCormick is engaged in business as a public hackman. While driving about the town, he runs over and severely injures Ross. Ross sues the Railroad Company. Which wins?

CHAPTER XL

THE TRANSPORTATION OF PERSONAL PROPERTY

570. Our main topic under the head of the transportation of personal property will be the carriage of goods by a common carrier. Incidentally, the law relating to personal baggage of passengers on railroad trains will be discussed. There are many different methods by which a bailee may transport personal property from one place to another. If he is not a common carrier, his liability is to be determined according to the rules laid down in Chapter XXXIX. Most of the transportation business is, however, in the hands of common carriers, who are subject to greater liability than the ordinary bailee; hence the necessity of treating this topic separately.

(A) Who is a common carrier?

571. A common carrier is one who holds himself out as being ready to carry for hire the goods of all persons that may employ him. A private carrier is one who agrees in a special case to transport personal property. The distinction between the two is that a common carrier of goods pursues the business of transportation as his calling or occupation, and undertakes to carry any person's goods within the limit of his facilities. On the other hand, a private carrier only undertakes the transportation of goods in special cases or for certain particular parties.

VARBLE *v.* BIGLEY, 77 Ky. 698 (1879). Varble, who was engaged in towboat and jobbing business, sued to recover compensation for towing a coal boat. Bigley defended on the ground that,

while in Varble's charge, the coal boat had sunk. The case hinged on the question whether or not Varble was a common carrier, it being agreed that if he was, he could not recover in view of the heavy liability laid on such carriers. *Held* that Varble was a private carrier and was, therefore, entitled to his compensation. Varble's business was such that the public could not reasonably suppose that he would tow for all who might offer. He did not operate on a definite route or between established terminals. Therefore, he could not be regarded as a common carrier.

Baker *v.* Maher, Howell N. P. (Mich.) 39 (1880). At a railroad station Baker intrusted her trunk to Maher, an expressman who habitually carried baggage to and from trains. Maher was to deliver the trunk at Baker's home, but on the way it was stolen. Baker sued him for the value of the trunk and its contents. *Held*, she could recover, for Maher was a common carrier and, therefore, liable in such cases.

572. Ordinarily, we think of railroad and express companies as the only common carriers. But the following have also in most cases been held to be common carriers: canal and pipe-line companies, proprietors of stage coaches and omnibuses, hackmen and cabdrivers, ferrymen, proprietors of steamships, schooners, barges, canal boats, and other vessels used for transportation.

573. The United States Statute of June 29, 1906, regulates interstate transportation. It provides that the term "common carrier" as used in the act shall include sleeping car companies. But such companies are usually not common carriers as regards transportation exclusively within the limits of a state.

(B) Duty to receive and carry

574. Under certain limitations a common carrier is obliged to receive and transport goods of whatever kinds he holds himself out as ready to carry, provided he has room for them. If, however, he professes to carry only

merchandise, he cannot be compelled to carry live stock. If he limits his obligation to transportation between New York and Chicago, he cannot be forced to carry from New York to San Francisco. No common carrier is required to provide other means of transportation than it owns or uses or holds itself out to the public as owning or using. Thus, it would be unreasonable to expect a local express company, which delivers goods by wagon from one point to another in a city, to transport goods by railroad from one town to another.

575. In order to force an unwilling carrier to transport goods, the shipper must tender the transportation charges in advance. If the goods are dangerous, improperly packed, or otherwise unfit for shipping, the carrier may refuse to receive them. Neither is he generally obliged to accept goods when he has not sufficient facilities for handling them. But, by statute, in many jurisdictions, railroad companies must provide sufficient facilities to handle all the traffic reasonably to be anticipated. A common carrier cannot unjustly discriminate between his customers. He must carry indifferently for all who offer, and under like conditions, give all the same terms and equal facilities.

(C) Delivery to carrier

1. What amounts to delivery?

576. The carrier's liability does not arise until the goods have been delivered to and accepted by him. The delivery must be made either to the carrier or his authorized agent, and the goods must be in his exclusive custody and control. For example, in case a steerage passenger obtains possession and control of his trunk, the ship company would not be liable for a loss sustained by him through theft, to nearly the same extent as if the trunk were entirely in the company's charge.

577. If when the carrier has received the goods for the purpose of immediate transportation, he places them for his own convenience in storage, he is liable as a carrier. If, however, after he has received the goods for transportation he delays their shipment for the owner's convenience, his liability is only that of a warehouseman.

Pine Bluff Ry. Co. *v.* McKenzie, 75 Ark. 100 (1905). At McKenzie's request, and in accordance with its custom, the railway company left two cars on its side track, agreeing to haul them off next day if loaded. The same day the cars were loaded and closed, and notice to remove them was given to the conductor of a freight train. He promised to move them next day, but at three o'clock the next morning the cars and their contents were destroyed by fire. McKenzie sued the railway company for the value of his property which had been burned. *Held* that there had been a complete delivery of the freight contained in the cars to the railway company, which was, therefore, liable for the loss, even though no bill of lading had been executed.

2. Delivery to connecting carriers

578. A carrier is not required to accept goods for carriage beyond the terminus of his own line. On goods thus consigned, he may limit his liability to that of a forwarding agent in making delivery to the connecting carrier, ceasing to be responsible for the goods when such delivery is made. But the Act of Congress of June 29, 1906, forbids such limitation of liability in interstate shipments.

Illinois Central Railroad Co. *v.* Frankenburg, 54 Ill. 88 (1870). Frankenburg shipped goods over the Illinois Central Railroad Company from Bloomsburg, Illinois, to Columbus, Ohio, and paid freight to Pana. The Illinois Central delivered the goods to the Terre Haute & Alton Railroad Company at Pana. They were spoiled in transportation from Pana to Columbus, and Frankenburg sued the Illinois Central Railroad Company. The bill of lading limited the liability of that company to its own line. *Held*, if a common carrier accepts goods consigned to a point beyond its

own line, it is generally responsible for their safe arrival at their destination. But it may by express contract limit its liability to the terminus of its own road, and Frankenburg could not recover from the Illinois Central. But see Act of June 29, 1906.

579. A carrier may by contract express or implied agree to carry to a point beyond the terminus of his own line. When he enters into an undertaking to carry the goods through to their final destination, all connecting lines of carriers are held to be his agents. He, therefore, becomes responsible to the shipper for loss or damage occurring on the connecting lines.

Elgin, Joliet & E. Ry. Co. *v.* Bates Machine Co., 98 Ill. App. 311 (1901). The Bates Machine Company shipped a flywheel over the E. J. & E. line from Joliet, Illinois, to Louisville, Kentucky. At Dyer, Indiana, the E. J. & E. Company delivered it to the Monon R. R. Company, by which company it was taken to its destination. While in the Monon Company's custody, the wheel was ruined, and the Bates Machine Company sued for its value. *Held* that the E. J. & E. Company was liable. The Bates Machine Company paid freight for transportation from the place of shipment to the final destination, and there was nothing in the bill of lading to limit the E. J. & E. Company's responsibility to injuries occurring on its own line. The acceptance by the E. J. & E. Company of the flywheel for transportation to a point beyond its own line showed a contract to carry and deliver the freight to the point of destination.

(D) Bills of lading

580. A common carrier's liability is created in large measure by law, and does not arise entirely from contract. Once the goods have been delivered to and accepted by him, his liability for them attaches. No writing of any kind is required to make him liable as an insurer. However, a bill of lading or shipping receipt is usually issued to the shipper. This bill of lading or shipping receipt is both a receipt and a contract. So far as it acknowledges

the delivery and acceptance of the goods it is a receipt. So far as it provides for the terms and manner of shipment and the carrier's liability, it is a contract. As a receipt it is good, but not always conclusive, evidence that the carrier has received the articles mentioned in it. See Sections 241, 582 and 583.

(E) Duty to carry safely; discrimination

581. Having received the goods, the carrier is liable for their safety. The general rule is that a common carrier is an insurer against loss or injury occurring in any way except by the act of God or the public enemy. But he is not liable as an insurer for losses caused by the fault of the shipper. Again, if the goods are seized by the public authorities, as, for example, animals infected with contagious diseases, the carrier is not liable as an insurer; or, if the goods are of a perishable nature, the carrier is not liable in the absence of negligence.

582. Except in a few states, common carriers may, by contract with the shipper, limit their liability to a certain extent. The terms of this contract are usually included in the bill of lading. See Section 580.

583. The law does not allow a carrier to free himself from the consequences of the fraud or felony of either himself or his servants. Neither does it allow him, except in New York, to contract for exemption from any liability for loss due to his own or his servants' negligence. Save as above, however, he can exempt himself from any liability which may arise out of the risks incident to transportation.

Missouri Valley R. Co. *v.* Caldwell, 8 Kans. 244 (1871). Caldwell shipped a mirror over the Missouri Valley Railroad. The bill of lading provided that the mirror should be at Caldwell's risk as regarded breakage. While in the railroad company's charge it was placed on a levee, along with agricultural implements and other heavy freight, in a narrow passageway through which drays

passed. Being thus exposed, it was struck, overturned, and broken. Caldwell sued for its value. *Held*, the bill of lading operated only to relieve the carrier from his liability as an insurer. But it left him liable for lack of ordinary care, the same as most bailees for hire. He clearly displayed a want of such care, and was bound to pay Caldwell for the mirror.

584. The carrier is allowed by contract with the shipper to put a maximum value on the goods beyond which the carrier shall not be held liable in case of loss. If the goods are worth more than the maximum value usually set, the shipper must at the time of delivery state what they are worth, and pay extra for having them transported proportionately to such increased valuation.

585. It is allowable for the carrier to limit the period within which claim shall be made upon him by the owner of the goods in case of loss, provided the owner is given a reasonable time. The object of such stipulation is to enable the carrier to look into the matter while it is still fresh.

586. Common carriers are not allowed to discriminate between customers in the transportation of either freight or passengers. They must carry indifferently for all that offer. They cannot give preference to some, or make unequal charges, but must charge all equally for similar services, and carry for all persons who apply in the order of their application. They are subject to an action for damages for a refusal to carry when they have facilities, or for discriminating in favor of some of their patrons to the detriment of others.

(F) Custody and control of the goods, and rights in them

587. Common carriers are entitled to a reasonable compensation for their services. They cannot be compelled to carry gratuitously. Neither can they charge exorbitantly

high rates for transportation. Usually the carrier's charges are fixed by contract. If there is no contract the carrier is entitled to the usual or customary charge. In the absence of a customary rate, the carrier may recover a reasonable compensation. The rate may be fixed by statute. A statute fixing a maximum rate which is unreasonably low amounts to a confiscation of the carrier's property without due process of law, and is, therefore, unconstitutional.

588. The carrier may demand his compensation in advance, and refuse to accept goods unless prepaid. If the goods are not prepaid he may claim his freight after he has carried them and is ready to deliver them. The shipper is originally liable to pay freight. But if the consignee accepts the goods, the law presumes that he owns them and makes him liable for the freight. The law gives the common carrier a lien for the whole amount of the freight upon every part of the goods. Therefore, if a part of the goods has been delivered, the carrier may retain the balance until his entire freight has been paid.

589. Carriers by water generally contract for the payment by the consignee of a certain sum for each day the carrier is detained by reason of the consignee's failure to receive the goods. This charge is called demurrage. Railroads usually discharge their own cargoes and have warehouses in which to store them. If the consignee fails to receive the goods promptly, he is liable for warehouse charges. Where goods are delivered to the consignee in the carrier's railroad cars, the carrier may charge a reasonable compensation for the use of his cars if the consignee keeps them longer than is proper.

590. In addition to his right to compensation, the carrier has certain other rights in respect of the goods. He may maintain an action against anyone who seizes or damages the goods while they are in his possession. He has an

insurable interest in them, and may, therefore, insure them to their full value. In certain emergencies, as where perishable fruit is about to spoil, the carrier may sell the goods.

(G) Termination of liability; delivery by carrier

591. Generally, the requisites of a valid delivery by the carrier are three. It must be made (1) at a reasonable time, (2) at a proper place, and (3) in a proper manner. If the delivery does not contain these requisites, the carrier will not be relieved of his responsibility for the safety of the goods. Circumstances of time, place, and manner, as well as of the person to whom delivery is made, are of great importance in determining whether or not the carrier's delivery has relieved him of his extraordinary liability.

Singer *v.* Merchants Despatch Transportation Co., 191 Mass. 449 (1906). Louis Singer of Boston shipped goods to himself at Springfield, Illinois, naming the consignee, "L. Singer." The transportation company's contract did not require the production of a shipping receipt or a bill of lading upon delivery of the goods to the consignee. Lena Singer of Springfield, who did business as L. Singer and who was known to the carrier, demanded the goods. They were delivered to her, though she did not present either a bill of lading or a shipping receipt. Louis Singer sued for the value of the goods. *Held*, the carrier performed his contract by delivering the goods to L. Singer, and was not liable. Louis Singer had failed to tell the carrier that he meant the goods for L. Singer of Boston and not L. Singer of Springfield.

1. Delivery by carriers by water

592. Carriers by water are not ordinarily obliged to deliver goods personally to the consignee. All that is required of them is that they shall land the goods upon the wharf or other proper place, and notify the consignee. It

is then the consignee's duty to take them away, and if he does not do so in a reasonable time, the carrier may put them in storage for the consignee, and at the consignee's risk and expense.

2. Delivery by railroad companies

593. There is no uniform rule regarding the delivery required of railroad companies in order to change their liability from that of insurers to that of ordinary bailees for hire. Railroad companies are nowhere required to deliver freight to a consignee's place of business not connected with their tracks, personally, but the states differ as to what circumstances constitute performance of a carrier's contract to deliver freight at the point of destination.

594. In Georgia, Illinois, Indiana, Iowa, Massachusetts, Missouri, North Carolina, Pennsylvania, and South Carolina the rule is that a railroad company is required only to deposit the goods in safety upon its station platform, or in its warehouse, to await delivery to the consignee when he shall call for them. The carrier is under no duty to notify the consignee of the arrival of the goods. From the time of their deposit at the point of destination the carrier's liability is changed from that of an insurer to that of a warehouseman, and he is liable only for the degree of care required in the case of ordinary bailments for mutual benefit. This rule is based on the assumption that the consignee has been notified by the shipper or in some other way that the goods are in transit, and that he can calculate approximately the time of their arrival, whereupon it is his duty to call for them.

Norway Plains Co. *v.* Boston & Maine Railroad Co., 1 Gray (Mass.) 263 (1854). The Norway Plains Company delivered to the railroad company at Rochester, N. H., certain goods to be shipped to Boston. They arrived in Boston on time and were taken from the cars and placed in the company's warehouse. No notice of the

arrival of the goods was given to the Norway Plains Company or to its agent. During the night the warehouse burned down and the goods were destroyed. The fire was not due to any negligence on the part of the railroad company. The Norway Plains Company then sued for the value of the goods. *Held* that the railroad company was not liable as a common carrier. Its contract was only to carry the goods safely to the place of destination and there to put them on the platform, and to deliver them to the consignee if he was there to receive them; or if the consignee was not there, to place them securely and keep them a reasonable time to be delivered when called for. It had fulfilled its contract by storing the goods in its warehouse, and could not be held liable as a common carrier for their destruction by fire.

595. In Arkansas, Kansas, Kentucky, Louisiana, New Hampshire, Vermont, West Virginia, and Wisconsin the carrier is not obliged to notify the consignee of the arrival of the goods. But when the carrier has put the goods on his station platform or stored them safely in a suitable warehouse, he remains liable as an insurer until the consignee has had a reasonable opportunity to remove the goods.

Moses *v.* Boston & Maine R.R. Co., 32 N. H. 523 (1856). Moses delivered ten bags of wool to the railroad company at Exeter, N. H., to be transported to Boston. The train on which the wool was loaded arrived in Boston and the wool was transferred to the railroad company's warehouse at about three o'clock in the afternoon. Generally, two or three hours were required to unload the freight from the cars into the warehouse, and the gates of the yard were closed at five o'clock, so that no goods could be removed from the warehouse after that hour until the next morning. During the night the warehouse and its contents, including the wool, were destroyed by fire. Moses sued the railroad company for the value of the wool. *Held* that the railroad company was still liable as a common carrier, and hence must pay Moses the value of the wool. The liability of railroad companies as common carriers continues until the goods are delivered at the point of destination and the consignee has had a reasonable opportunity to remove them.

596. In Alabama, California, Michigan, Minnesota, Mississippi, New York, Ohio, Tennessee, and Texas it is held that if the consignee is not actually present at the point of destination the carrier, in order to terminate his liability as insurer, must give the consignee notice of the arrival of the goods, and allow him a reasonable time in which to remove them.

Sprague *v.* New York Central R.R. Co., 52 N. Y. 637 (1873). Sprague delivered goods to the railroad company at Fonda, N. Y., consigned to the American Express Company at Albany, N. Y. No notice of their arrival at Albany was given to the express company. Sprague sued for injuries to the goods caused three days after their arrival by a heavy freshet which overflowed the freight house where they had been stored. *Held* that it was the railroad company's duty to give notice of the arrival of the goods, and as it had failed to do so, its liability as a common carrier continued, and it was bound to make good Sprague's loss.

3. Delivery by express companies

597. Express companies do a different business from that of railroad companies. For the most part they carry small and valuable packages. They undertake to make delivery to the consignee personally, and the law holds them to this undertaking with great strictness. However, at unimportant way stations, where they have no facilities for local delivery, they need only notify the consignee of the arrival of the goods and give him a reasonable length of time to call for them.

(H) Baggage

598. Carriers of passengers are obliged to receive the baggage of their passengers. Their liability with respect to it is that of insurers. The passenger is entitled to have a reasonable amount of baggage carried as incidental to the contract to carry him. The price paid for his ticket is the consideration for the transportation of both, provided

the passenger has his baggage ready for shipment in time to go in the same train that he takes himself.

599. There is no hard and fast rule as to what may be considered "baggage." In general terms, "baggage" signifies those articles of convenience or necessity which are ordinarily carried by a passenger for his personal use during the journey or on arriving at his place of destination, and such as individuals in a similar station of life would commonly have. This would include not only articles of apparel, but also guns for sporting purposes, the tools of a mechanic, the easel of an artist on a sketching tour, the books of a student, a watch and a reasonable supply of jewelry intended to be worn by the traveler on his journey, and other articles of an analogous character. What is carried for purposes of business, such as merchandise, or for household use, such as furniture, is not ordinarily regarded as baggage unless accepted as such by the carrier.

Railroad Co. *v.* Baldwin, 113 Tenn. 205 (1904). Baldwin, a livery stable keeper, bought a ticket for his wife to Helena, Ark., from Jonestown, Miss. He and his wife were journeying to Helena for the purpose of making it their home. One of the wife's trunks contained a small quantity of her husband's clothing. The trunk and its contents were lost, and suit was brought against the railroad company. *Held* that it was liable for the trunk and its contents including the husband's clothing. It is customary for a wife of the station and condition in life of Mrs. Baldwin to pack in her trunks a few articles of her husband's clothing when they are traveling together.

Nevins *v.* The Bay State Steamboat Co., 4 Bosw. (N. Y.) 225 (1859). Nevins was a passenger on the defendant's steamboat *Metropolis*. His trunk contained certain jewelry, masonic regalia, and engravings. During the trip the trunk was lost, and Nevins sued the steamboat company for the value of these articles. *Held* that the carrier was not liable. The contents of the trunk were not intended for the personal convenience of the traveler on the journey, and were not properly baggage.

QUESTIONS

1. Who is a common carrier? Who is a private carrier? Distinguish between a common carrier and a private carrier. Give examples of common carriers.

2. What goods must a common carrier accept for transportation?

3. How may a shipper force an unwilling carrier to accept goods for transportation? When does a common carrier's liability commence?

4. Can a common carrier be obliged to accept goods for carriage beyond his own line? When will a common carrier be liable for injuries resulting to goods on points beyond the terminus of his own line? What is a bill of lading?

5. When is a common carrier relieved from responsibility for the loss of goods? May a common carrier exempt himself by contract from liability for the loss of goods?

6. The Great American Railway's shipping receipt provides that the company's liability for goods carried shall be limited to $100 unless a higher value is declared at the time of shipment. Can Mackintee recover $300, the value of certain furs lost in transit or will the amount of his recovery be limited to $100?

7. What is the rule as to discrimination by a common carrier?

8. How is a common carrier's compensation fixed?

9. What is a common carrier's lien?

10. Who is commonly liable for the payment of freight charges?

11. What is demurrage?

12. May a common carrier sue third parties for injuries to the goods? May he insure the goods?

13. Enumerate the requisites of a valid delivery by a common carrier.

14. What is the rule with respect to delivery by carriers by water? Delivery by railroad companies? Delivery by express companies?

15. What is baggage?

16. Mary Freehoff, a wealthy foreigner traveling in this country, sued the Southern Railroad Co. for the loss of her baggage. Her trunk contained lace of the value of $10,000 which was a part of her wearing apparel. Is the railroad company liable to her for the value of this lace?

SALES AND MORTGAGES OF PERSONAL PROPERTY

CHAPTER XLI

THE DEFINITION OF A SALE, AND THE DISTINCTION BETWEEN SALES AND BAILMENTS

600. When a sale takes place, the title to property passes from one person, called the seller, to another, called the buyer or purchaser. By the passage of title, the buyer becomes the owner of the property sold. Sometimes the seller is called the "vendor," and the buyer is called the "vendee." A sale is defined in Section 603.

601. The rules to be discussed apply not only to sales of tangible articles of personal property, such as books or automobiles, but to sales of intangible personal property as well. Intangible personal property includes such rights as patents, copyrights, trademarks, trade names and other forms of advertisement.

602. In purchasing certain kinds of property care should be taken to observe the various statutory provisions with regard to recording. For example, unless an assignment, grant, or conveyance of a patent be recorded in the United States Patent Office within three months, it will not be good as against a subsequent purchaser without notice thereof. Recording is not necessary to pass title as between the parties, so that an unrecorded assignment is good as

against everyone but a subsequent purchaser without notice. But, suppose that A assigns a patent to B, who fails to record the assignment within three months. If after that period A assigns to C, who promptly records his assignment, having no notice of the prior one, C's title will be good as against B. See Section 674.

(A) The formation of a contract of sale

603. A sale is a transfer by which one party passes the ownership of property to another in return for money, or a promise to pay money. A sale differs from a barter, since in the former the consideration is money, while in the latter it is some other kind of property.

604. Sales, being based on contract, are subject to the rules of contract law. When the buyer acquires the right of property immediately upon making the contract, it is called an *executed* contract of sale. When he is to acquire the right of property at some time in the future or upon the performance of a condition, the contract is said to be *executory*. The fact that the buyer has acquired the right of property is generally shown by a delivery of the thing sold. But the parties may agree that while the buyer is to acquire the right of property, the seller is to retain possession until all or part of the purchase price has been paid.

MIDDLETON *v.* BALLINGALL, 1 Cal. 446 (1851). Ballingall agreed to sell Middleton certain goods then being forwarded from Java to San Francisco. It was stipulated that the contract should not be considered binding until the ship's arrival. The ship never arrived, and Middleton sued Ballingall to recover damages for the nondelivery of the goods. *Held* that Middleton could not recover. The contract was executory, and the fulfillment of it depended on the contingency of the ship's arrival.

605. A valid contract of sale must, of course, contain the five elements necessary to every contract. The follow-

KNOW ALL MEN BY THESE PRESENTS, That I, *Roger Thorn, of the City of Buffalo, Erie County, State of New York*, of the first part, for and in consideration of the sum of *Two Hundred Dollars ($200)*, lawful money of the United States of America, to me paid at or before the sealing and delivery of these presents, by *Levi Webb, of the same city*, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold and by these presents do grant and convey unto the said party of the second part, his executors, administrators, and assigns, *my iron gray horse known as Random.*

TO HAVE AND TO HOLD the same unto the said party of the second part, his executors, administrators and assigns forever. Furthermore I covenant with the said party of the second part that I own and have the right to sell and transfer the said property, and I will defend the same against any person or persons whomsoever claiming the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the *sixteenth* day of *June* in the year *one thousand nine hundred and nine.*

[*Signed*] ROGER THORN (SEAL)

In the presence of
[*Signed*] JAMES MACDONALD.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO. } *ss.:*

On this *sixteenth* day of *June* in the year *one thousand nine hundred and nine* before me, the subscriber, personally appeared *Roger Thorn*, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

[*Signed*] M. DEANE PRESSEY,
(NOTARIAL SEAL) Notary Public for Erie County, New York.

ing requisites must also be present in the agreement: *first*, the subject matter of the agreement which is owned in most cases by the seller; *second*, an agreement by the parties that the property in the thing is transferred or is to be transferred from the seller to the buyer; *third*, payment or an agreement for payment of a price in money by the buyer to the seller. The contract need not be in writing, but may be made verbally or implied from the conduct of the parties, except as noted in Sections 153 and 154.

A form of bill of sale in general use is shown on page 300.

(B) Sales and bailments distinguished

606. A bailment of property should be carefully distinguished from a sale. In a bailment, the bailee gets possession of the thing, but he does not get the right of property or title to the thing, which remains in the bailor. In a sale the transfer is of the property itself; the ownership is passed from seller to buyer, and the possession may or may not be transferred.

QUESTIONS

1. What is a sale? Define vendor. Vendee.
2. Distinguish a sale from a barter.
3. Define executed and executory contracts of sale.
4. What elements must be contained in a valid contract of sale?
5. Distinguish sales from bailments.

CHAPTER XLII

THE TRANSFER OF TITLE FROM SELLER TO BUYER

607. In this chapter we shall consider, *first*, when the title passes by virtue of a contract of sale, and, *second*, what title is acquired by the purchaser.

(A) When the title passes to the buyer

608. It is often important to decide the exact moment when the contract of sale passes the rights of property from seller to buyer. As a rule, the passage of title determines who shall bear the risk of loss by fire or other causes incident to the ownership of goods. Generally, the right of property passes at the time when the parties intend that it shall pass. The contract of sale may definitely express the intention of the parties as to the passage of title. If it does not, what the parties probably had in mind is to be ascertained from a consideration of the particular circumstances of each case.

Morgan *v.* King, 28 W. Va. 1 (1886). King sold Morgan all King's merchantable timber at certain places. Nothing was said about examining and measuring it, but Morgan spent a short time in sawing part of the timber into logs. Then he became sick, and during his sickness the lumber was swept away by a flood. King sued Morgan for the price of the lumber. *Held* that King was entitled to recover. The circumstances made it clear that the parties intended title to pass at once to Morgan. Therefore, the loss was Morgan's and not King's.

609. Usually, title is held to pass at the moment when the seller delivers the goods to the buyer. If the seller delivers the goods to a common carrier for transportation, the carrier is generally regarded as the buyer's agent, and title passes to the buyer when the goods are delivered to the carrier. The buyer ordinarily pays the freight. The carrier is thus his agent, and the contract is performed when the seller delivers the goods to the buyer's agent. But if the seller agrees that he will deliver the goods at a certain place, the carrier who takes them there is his agent, and the buyer does not become the owner until the goods are delivered at the place agreed upon.

GATES *v.* CARQUINEZ PACKING CO., 78 Cal. 439 (1889). Under a contract for the sale of fruit, the packing company was to deliver it on cars consigned to Gates, and to send daily statements of weights. The fruit was to be reweighed on arrival at the cannery, and in case of difference, the weight was to be adjusted. In a suit for the price of a shipment, the question arose as to who must suffer the loss caused by shrinkage in transit. *Held* that title passed on delivery to the carrier, and loss from shrinkage during transit must be borne by the buyer.

610. Where there is merely a contract to purchase at a future time, the buyer does not acquire title at the time the contract is made. While anything remains to be done by a seller title will not usually pass, as where the seller is required to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition called for by the contract.

611. Where the goods bought are a certain quantity from a larger bulk of uniform kind and quality, the property may pass even though there is no designation of the particular parts to be sold or separation of them from the bulk, if such is the intention of the parties. But this rule applies only where the larger quantity is composed of uni-

form parcels, and not where the parcels differ in quality or possess a distinct individuality. For example, 1,000 bushels of wheat may be sold out of a mass of 8,000 bushels stored in a grain elevator without designating the particular 1,000 bushels which the buyer acquires by the contract.

(B) What title passes to the buyer

612. As a general rule, the seller of personal property can give no better title than he himself has. Therefore, if you buy goods from a thief or bailee, you cannot usually acquire a greater interest therein than the seller had. Certain exceptions to this rule will be treated under the following subdivisions. See also Section 618.

1. Negotiable instruments

613. When a negotiable instrument is transferred in due course to a holder in good faith and for value, he usually acquires a clear title thereto, although the seller's title may have been defective. See Section 177.

2. Where the owner deceives third persons as to the title

614. An owner of property may be estopped by words or conduct from attacking the buyer's title if he has willfully caused the buyer to believe that the goods belong to a third person whom the buyer pays for the goods in reliance on such belief. This is on the principle that where one of two innocent persons must suffer by reason of a third person's fraud, the loss should fall on him who enabled the wrongdoer to perpetrate the fraud.

3. Two purchasers of the same goods

615. Suppose after a man buys goods he allows them to remain in the possession of the seller, who thereupon sells

and delivers them to a second purchaser. Suppose the latter pays for the goods in ignorance of the prior sale. Since the first purchaser's conduct in leaving the goods with the seller has enabled the latter to mislead the second purchaser by his statement that he still owned them, the second purchaser gets a good title. If the second purchaser also allows the goods to remain with the dishonest seller, who afterwards delivers them to the first purchaser, the latter may hold them as against the second purchaser. Where both parties are equally negligent, the one who has possession may keep it.

HIGHT *v.* HARRIS, 56 Ark. 98 (1892). Hight bought a mule from Largent, to whom he paid the price. The mule was to be delivered afterwards. Later the same day Largent sold the animal to Harris, who paid for it and took immediate possession in ignorance of the prior sale to Hight. Hight sued to get the mule. *Held* that the retention of possession by the seller of personal property after the sale raises a presumption of fraud, as against subsequent *bona fide* purchasers. Therefore, Hight lost his case.

QUESTIONS

1. When does title to goods sold pass from seller to buyer?

2. The Midland Railway Company of England ordered of the Commonwealth Steel Company one thousand tons of steel rails. The steel company delivers the rails to the Meteor Line, a common carrier, for transportation to England. The Meteor Line's boat is lost at sea. The steel company sues the railroad company for the price of the rails. Which wins?

3. When does the buyer get a better title than the seller himself had?

CHAPTER XLIII

THE RIGHTS OF THE SELLER OF PERSONAL PROPERTY

616. The seller's rights depend largely upon the terms of the agreement he has made with the buyer. Certain phases of contract law which particularly concern sales of personal property will be treated in this chapter. We shall consider, *first*, the seller's right to set aside the contract if the buyer has committed fraud; *second*, the seller's lien for the purchase money, or right to refuse delivery until the purchase money has been paid; *third*, the seller's right of stoppage in transit.

(A) The seller's right to set the contract aside if the buyer has committed fraud

617. It is a general rule that when one party has been induced to enter into a contract by the other party's fraud, the contract is voidable at the option of the party defrauded. Fraud is a false representation of fact made with knowledge that it is false, or in reckless disregard as to whether it is true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act. See Section 115.

618. Let us imagine that the owner of goods is defrauded into agreeing to sell them by the purchaser's false representations. If the seller learns of the fraud before he has delivered the goods to the buyer he may refuse to go ahead with the transaction. But suppose that, after the goods have been delivered to the purchaser on credit, the seller learns that the former's statements as to his financial

condition were untrue. If, in the meantime, the defrauding buyer has sold the goods to an innocent third party, the latter gets a good title and the original seller cannot reclaim the goods from him.

KERN & LOEB *v.* THURBER & CO., 57 Ga. 172 (1875). Kern & Loeb sold eleven barrels of sugar in New York to Barnard & Co., of Columbus, Georgia, who fraudulently induced Kern and Loeb to sell them on credit. Before the goods arrived in Columbus, Kern & Loeb learned that Barnard & Co. were insolvent. They failed in an attempt to stop the goods in transit. When the sugar reached Columbus it was sold and delivered by Barnard & Co. to Thurber & Co. Kern & Loeb sued Thurber & Co. to recover the sugar. *Held* that Thurber & Co. had a good title. Though the title of Barnard & Co., having been obtained by fraud, was voidable, Thurber & Co. were innocent purchasers without knowledge of this fraud.

619. If, however, when the seller learns of the buyer's fraud, the goods are still in the latter's possession, the seller has two courses of action open to him. He may enforce the contract, or he may rescind it. Generally, the latter procedure is adopted. The seller should be careful lest he waive his right to set the contract aside on the ground of fraud. If, after discovering the fraud, he sues for the purchase price, or takes a note for it, or proves his claim for the price in insolvency proceedings, he loses his right to rescind the contract. The seller should disaffirm the sale, alleging that it was not a genuine contract, because it lacked reality of consent, the fourth element necessary to every contract. He should bring an action to recover the goods on the ground that he has a right to have the sale annulled, and the goods restored to him.

LEVI *v.* KRAMINER, 2 Ind. App. 594 (1891). Levi falsely represented to Kraminer that he was solvent and doing a prosperous business. Kraminer, relying on this representation, sold him goods on four months' credit. When Kraminer learned that

Levi's statements were false, he sued him to recover the property. *Held* that if one, knowing himself to be insolvent, obtains goods on credit by falsely representing his financial condition, the seller may set aside the sale and recover the property. Therefore, Kraminer was entitled to the goods, although the four months had not elapsed when he brought suit against Levi.

620. Ordinarily, where one person falsely passes himself off for another, or represents himself to a seller as the agent or another individual, and the seller, misled thereby, sells and delivers goods to him, the impostor does not acquire title by the trick.

RODLIFF *v.* DALLINGER, 141 Mass. 1 (1886). Rodliff, on the representation of Henry Clementson that he was acting for a manufacturer who was in good credit with Rodliff, agreed to sell him a quantity of wool and took Clementson's note in payment. Clementson pledged the wool with Dallinger to secure a loan. Before Clementson's note fell due Rodliff discovered that Clementson had not been acting as an agent but on his own account. Thereupon Rodliff sued Dallinger to recover the wool. *Held*, since Clementson was not acting for the manufacturer, but for himself, there was no sale. Clementson, not having any title, could convey none even to a *bona fide* purchaser or pledgee, and Rodliff was entitled to the wool as against Dallinger.

621. All the states have laws which help keep merchants from suddenly disposing of their goods in bulk and eluding their creditors. These laws, which are known as Bulk Sales Acts, vary in some particulars. Many of the Bulk Sales Acts provide that a sale by a merchant of his whole stock, or a large part of it, in a single transaction and out of the ordinary course of trade, shall be deemed fraudulent unless his creditors are notified of his intention to make such sale, a certain length of time before the sale is consummated.

(B) The seller's lien to secure payment of the purchase money

622. In a cash sale, after the title to the goods has passed to the buyer, the seller, if he still retains possession of them, may refuse delivery until paid the purchase price. Suppose, for instance, that title has passed to the buyer, but that the seller is to hold the goods until the buyer needs them. If the sale is not on credit, the seller has a lien on the goods to secure payment. Suppose that the sale is on thirty days credit, and at the expiration of that time the goods are still in the seller's hands and his bill has not been paid. In that case his lien would then revive. Or, if during the period of credit the buyer became insolvent, the seller's lien would revive, if he still had the goods.

ARNOLD *v.* DELANO, 4 Cush. (Mass.) 33 (1849). Delano sold lumber to Arthur Sowerby, agreeing that Sowerby might remove it at any time within a year. He gave Sowerby a bill of sale and received Sowerby's promissory note for the price payable in six months. Before six months passed Sowerby became insolvent. His assignee, Arnold, sued Delano to recover the lumber. *Held*, Delano could retain the lumber until paid the price. There was a complete sale, but Delano had a lien for the price. By giving credit, he waived his lien, but only on the implied condition that Sowerby should keep his credit good. When Sowerby became insolvent, Delano's lien revived.

623. Unconditional delivery of the goods to the buyer or his agent terminates the seller's lien. But if a quantity of goods are sold under a single contract, and the seller delivers some of them without being paid anything, his lien for the entire price remains on the goods still in his possession. In the case of a delivery to a common carrier the question whether or not the seller has waived his lien hinges on the point whether the common carrier is agent for the seller or the buyer. Usually, the common carrier is regarded as the buyer's agent, and hence, as a general

rule, on delivery to the carrier the seller loses his lien. But if the seller has agreed to deliver the goods at the buyer's place of business or has reserved the right of disposal, the carrier is looked upon as the seller's agent, and the seller does not lose his lien by delivery to the carrier. See Section 609.

624. Where the buyer fails to pay on time, and the seller still has the goods, he may not only refuse to deliver them unless paid, but may also, as a rule, drop the contract and sell his goods to another party. See Section 266.

(C) The seller's right of stoppage in transit

625. We have seen that where the seller delivers goods to the carrier as the buyer's agent, he thereby loses his lien for the purchase money. But even though title has passed to the buyer, if he becomes insolvent before the goods are delivered to him by the carrier, the seller has the right of stoppage in transit. This enables him to resume possession of the goods if they are still in transit, and to keep them as security for payment of the purchase price. He should notify the carrier to hold the goods in time to prevent delivery to the buyer.

626. The right of stoppage in transit may be exercised only in case of the buyer's insolvency. The fact that the buyer has ceased to pay his bills in the usual course of business, or any other fact showing that he cannot meet his obligations, would justify the seller in directing the carrier not to deliver the goods to the buyer.

627. The seller may waive the right of stoppage in transit either expressly or impliedly. Again, the seller's right may be lost if the buyer has transferred a negotiable bill of lading to a purchaser for value, who has taken it in good faith and without notice of the buyer's insolvency. See Section 241.

628. The right of stoppage in transit relates only to the particular goods which are being transported. The seller may not stop in transit goods which have been paid for, in order to secure payment of what the purchaser owes him on other accounts.

QUESTIONS

1. What is fraud? What are the rights of the seller when the buyer's fraud induces the making of the contract?

2. Watson falsely represents to Clothier, a merchant, that he, Watson, is the agent of Lindsay, with whom Clothier has had business dealings. Clothier, relying on Watson's representations, sells and delivers to him goods on Lindsay's credit. Before Clothier learns the truth Watson sells the goods to Parks, who pays for them in ignorance of the manner in which Watson has obtained them. Clothier sues to recover the goods from Parks. Which wins?

3. What is the effect of a purchaser's false statements to a mercantile agency regarding his financial condition, if the seller, a subscriber to the agency's reports, extends credit to the purchaser on the faith of such statements?

4. What is a bulk sales act? Is there such an act in your state?

5. What is the seller's lien?

6. How does the seller lose his lien?

7. When will the seller's lien revive?

8. What is the seller's right of stoppage in transit?

9. When may the right of stoppage in transit be exercised?

10. How may the seller's right of stoppage in transit be defeated?

CHAPTER XLIV

THE RIGHTS OF THE BUYER OF PERSONAL PROPERTY

629. We may consider the purchaser's rights under two heads: *first*, his right to make the seller deliver goods of a certain kind and quality; *second*, his right to insist that a clear title to the property purchased must be transferred to him. There are numerous other rights which a purchaser may obtain under a contract of sale, but they do not require special treatment here. For instance, it is stated in Section 266 that a provision in mercantile contracts as to the time of performance is usually an essential feature thereof. Hence, if the seller of goods in such a transaction fails to deliver them on time, the purchaser may usually refuse to go ahead.

(A) The buyer's right to get goods of a certain kind and quality

630. The purchaser's rights for the most part group themselves around the idea that he should get what the seller agreed to give, in order that the contract may be properly performed. While this is true, it must not be inferred that the purchaser has a right to set aside the contract if the goods turn out to be less valuable than he expected. If he sees what he buys, he cannot usually return it merely because he learns later that it is of inferior quality. He has got what he bargained for, and the fact that he thought he was getting something very much better does not enter into the contract. The buyer should remember that in the ordinary sale transaction the maxim of the law

is *caveat emptor*, which means, "let the buyer beware." He should, therefore, judge for himself of the value of the goods which are offered for sale and not be misled by anything the dealer may say in praising his wares.

1. Where the seller acts fraudulently

631. It does not follow from this that the seller may make any statement he pleases about his goods. The law sets certain well-defined limits to the right of the seller to praise his wares. If, for example, he defrauds the buyer, the latter has a right to set the sale aside. The seller may freely express his opinion as to the qualities or characteristics of the article which he offers for sale, but if he misrepresents facts with the intention of deceiving the purchaser, the contract is voidable at the latter's option. See Section 115.

Hicks *v.* Stevens, 121 Ill. 186 (1887). Hicks was the inventor of the "Hicks Tube Closer," which he represented to Stevens as a valuable invention. He assured Stevens that it would save 15 per cent. more steam than any other apparatus of its kind. Stevens, relying on Hicks's representations, bought the patent right. Later he discovered that Hicks's statements were false, and he sued to have the sale rescinded. *Held*, Hicks's representations related to matters of fact peculiarly within his own knowledge, and Stevens had a right to rely on them. As they were untrue the agreement was set aside.

Boles *v.* Merrill, 173 Mass. 491 (1899). Merrill sold Boles certain horses and wagons and the good will of an express business. He represented to Boles that there were ten regular customers who each paid $10 a month, that another customer named Marble paid $60 a month, and that the business was earning $2,500 net yearly. When Boles discovered that these representations were false, he sued to have the sale rescinded. *Held*, the representations were not mere dealer's talk. They related to very material matters of fact, and Boles had a right to rely on them. Therefore, the agreement was set aside.

632. As a rule, it may be said that the seller's silence about the defects of his goods, or even his general assurance that the goods are all right, will not amount to fraud. Sometimes, however, the circumstances may be such that the purchaser is entitled to the benefit of whatever information the seller may have. Where, for example, one employs an agent to purchase land of a certain character, and the agent offers to his employer land of his own, stating that it is quite fitted to his employer's wants, the fiduciary relationship in which the seller stands to the purchaser binds him to tell all he knows about the suitability of the land for his employer's requirements. See Sections 113 and 114.

2. Where the seller warrants his goods

633. If a buyer intends to rely on the seller's representations as to the quality of the goods, he should be careful to make the seller warrant the truth of these representations. While the warranty need not be in writing, it is better to have it written if possible. The fact that the seller's statements have been put in writing may help to convince the court that the parties really considered them as warranties. If the same words were used verbally, the court might treat them as mere dealer's talk, not meant to be binding.

Worth *v.* McConnell, 42 Mich. 473 (1880). McConnell sued Worth for the price of a threshing machine. Worth defended on the ground that McConnell had told him the machine was "a very good machine and would do very nice work"; and that this constituted a warranty, which had been broken. *Held* that this statement was mere dealer's talk in praise of his wares, and McConnell was, therefore, entitled to recover, although really the machine was not very good, and did not do excellent work.

634. If the seller makes a positive assertion concerning his goods which is intended as a statement of fact, and

which is so understood by the purchaser, who makes his acceptance of the goods depend upon the truth of the seller's statement, it will be held that the seller has warranted his goods. For example, a statement that tobacco was "sound, redried, and would certainly keep," has been held to be a warranty.

STEVENS *v.* BRADLEY, 89 Ia. 174 (1893). At a public sale of hogs Bradley declared to the bidders that the hogs "were as thrifty and healthy a lot of hogs as the owner has ever owned in his life, and he has been in the business a good many years." Stevens bought twenty-seven of the hogs which he discovered later to be diseased. He then sued Bradley for breach of the warranty that the hogs were sound and healthy. *Held* that Stevens could recover. Bradley's statement was a material representation of fact. It was a distinct affirmation of health and soundness, and constituted an express warranty that the hogs were free from disease.

635. The article sold must be of the same kind as that contracted for. If the seller tries to substitute an article of an entirely different species from that called for by the terms of sale, he has failed to fulfill his contract, and the buyer may return the article. Where the bill of sale called for indigo and the article delivered was not indigo, but a different substance prepared so as to deceive even skillful dealers, it was held that there was a breach of the warranty that the article should be of the same kind as that contracted for, and that the buyer could return the goods.

636. If an article is ordered from the manufacturer for a purpose, specified to him by the purchaser, and the latter has no opportunity to inspect the article, there is an implied warranty that it shall be reasonably fit for that purpose.

637. If a buyer states that he trusts to the dealer's knowledge and orders an article to be used for a specified purpose, there is ordinarily a warranty on the part of the dealer that the goods shall be reasonably suitable for the buyer's purpose.

638. Where the buyer orders goods by description and has no opportunity to inspect them, there is usually an implied warranty that the goods shall conform to the description and be merchantable in quality. By merchantable is meant that they must be free from any remarkable defect, so as to be generally salable among dealers in the article. In sales of this kind the maxim *caveat emptor* does not apply. If, however, the buyer has had an opportunity to inspect, and neglects to utilize it, generally he will not be allowed to hold the seller any further than if the buyer had seen the goods himself. See Section 630.

639. In the case of sales of goods by sample, there is an implied warranty that the sample is an honest one and that the bulk shall correspond in quality with the sample.

(B) Warranty of the seller's title

640. Where a party who is in possession of goods sells them in his own right as absolute owner, the law generally implies a warranty on his part that he is the owner thereof and that he has a good title to the goods, even though he is silent on the question of his ownership, and whether or not he knew of any defect in his title. The sale is in itself an assertion of ownership. If the seller had no right to the property at all, the disappointed purchaser may recover the money which he has paid.

EXCEPTION. Where the seller acts in an official capacity as sheriff, administrator, executor, guardian or trustee in bankruptcy, he does not as a rule impliedly warrant the title to be in the party whom he represents.

QUESTIONS

1. What is meant by the rule of *caveat emptor?*
2. A sold a horse to B. He represented to B that the horse was a good, kind horse. In fact the horse was not sound. What rights has B?

3. A sold B one hundred bushels of wheat. B inspected the wheat in the bin before buying it and thought it was winter wheat. In fact it was spring wheat. Can B sue A for breach of warranty?

4. Baker ordered from Johnson, a manufacturer, a lawn mower. He found it was worthless owing to defective materials and workmanship. What remedies, if any, has he against Johnson?

5. When is a warranty implied? What is a warranty of title?

CHAPTER XLV

CHATTEL MORTGAGES

641. A chattel mortgage is a conditional conveyance of personal property to secure the payment of a debt or the performance of some other obligation. The essential feature of a chattel mortgage is that upon performance of the conditions, the instrument becomes void. If the debt is not paid, or if any other obligation resting on the mortgagor is not performed, the mortgagee usually gets an absolute title to the thing mortgaged. If the condition is performed, the mortgage becomes void, and the mortgagee has no title. See Section 257.

642. The subject of chattel mortgages is almost wholly regulated by the statutes of the various states, which differ widely from one another. Some states permit almost every kind of personal property to be mortgaged, while others refuse to recognize such mortgages except in the case of a few specified articles.

643. Most states require that a chattel mortgage shall be in writing and signed by the mortgagor, the owner of the chattels. Moreover, it is usually necessary that a chattel mortgage be acknowledged by the mortgagor before a notary public or other similar official, and recorded in the county where the chattels are located. The requirement as to recording is made for the benefit of third persons, who are thus enabled to learn the nature and extent of the mortgagee's rights. But an unrecorded chattel mortgage is ordinarily valid as against the mortgagor and as against third persons who have actually learned that the

mortgage has been made. In drawing up a chattel mortgage, care should be taken to follow the form recognized in the state where the chattels are. In general, it may be said that the mortgage should carefully specify: (1) the name of the mortgagor; (2) the name of the mortgagee; (3) the exact nature, number, and location of the chattels; (4) the precise condition upon the fulfillment of which by the mortgagor the mortgage shall become void and the mortgagee's rights thereunder cease.

644. A question often arises regarding the validity of a mortgage given by a merchant on his entire stock of merchandise. Suppose he remains in possession with a right to sell the goods in the usual course of trade, meanwhile keeping up the stock to a certain value. There are two views of this question on which the states divide about equally. In Arkansas, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wyoming it is held that where the mortgagor remains in possession with a power of disposal, the possession in itself is not fraudulent. Whether the transaction is a fraud on creditors and third parties is to be ascertained from all the circumstances of the case. Retention of possession by the mortgagor does not conclusively prove fraud. On the other hand, in Florida, Illinois, Mississippi, Montana, New Mexico, Oklahoma, Oregon, Tennessee, Texas, and Virginia, it is held that the mortgagor's retention of possession with a power of disposal conclusively stamps the transaction as fraudulent.

645. In the case of very many chattel mortgages, the mortgagor is allowed to retain the goods in his custody. If the mortgagor fails to perform the condition of the mortgage, the mortgagee may take possession immediately after the default. If the mortgagee fails to gain possession

within a reasonable time after default, he may find that other creditors have meanwhile come in ahead of him against the property. When he has taken possession under a valid mortgage made in good faith, his right is good against all persons until his debt is paid.

646. After the condition is broken the mortgagor has an equity of redemption similar to the right which exists in the case of real estate mortgages. The value of the equity of redemption is the difference between the total value of the property and the mortgage debt. If the mortgagor desires to exercise his right to redeem, he must do so within a reasonable time.

The following is a form of chattel mortgage:

To all to Whom these Presents Shall Come, Greeting: Know ye that I *Davis Coleman*, of *the City of Pittsburgh County of Allegheny and State of Pennsylvania*, party of the first part, am indebted unto *Stephen Donovan*, party of the second part, in the amount of *Three Hundred Dollars, being for money loaned.*

Now for securing the payment of the said debt and the interest from the date hereof to the said party of the second part, the party of the first part does hereby sell, assign, and transfer to the said party of the second part the *500 barrels of Portland cement* contained in the property *No. 78 Conestoga Street, Pittsburgh, Pa.*, the said cement now being and remaining in the possession of the party of the first part:

Provided Always, and this mortgage is on the express condition that if the said party of the first part shall pay to the said party of the second part the sum of *Three Hundred Dollars* with interest at *six* per cent. within *one year* from the date hereof, which said sum and interest the said party of the

first part hereby covenants to pay, then this transfer to be void and of no effect, but in case of nonpayment of the said sum at the time above mentioned with interest then the said party of the second part may give to the said party of the first part or the person in possession of the property and claiming the same written notice as required by law of his intention to foreclose this mortgage for breach of the condition thereof, and if the said sum is not then paid the said party of the second part shall have full power and authority to enter upon the premises of the said party of the first part or any other place or places where the aforesaid goods and chattels may be, to take possession of said property, to sell the same according to law, and the proceeds, after deducting all expenses of the sale and the keeping of the said property, to apply in payment of the above debt; if from any cause said property shall fail to satisfy said debt, interest, costs, and charges, the said party of the first part covenants and agrees to pay the deficiency.

In Witness Whereof, I, the party of the first part, have hereunto set my hand and seal this *twentieth* day of *July, 1909*.

Sealed and delivered in the presence of
[*Signed*] M. Deane Pressey

[*Signed*] Davis Coleman (seal)

State of Pennsylvania
County of Allegheny } *ss.:*

On the *twentieth* day of *July*, A.D. *one thousand nine hundred and nine*, before me, the subscriber, a notary public of the Commonwealth of Pennsylvania, residing in the City of Pittsburgh, personally came the above-named *Davis Coleman*, who acknowledged the foregoing instrument to be his act and deed and desired that the same be recorded as such, according to law.

[*Signed*] William Buchanan,
Notary Public.

(notarial seal)

My commission expires January 10, 1913.

QUESTIONS

1. What is a chattel mortgage? What is the effect of performance of the condition of the mortgage? Of non-performance?

2. What are the general formal requisites of the execution of a chattel mortgage? Against whom is an unrecorded chattel mortgage valid?

3. State the rules regarding the validity of a mortgage given by a merchant on his entire stock of merchandise.

4. What is the equity of redemption?

LEASES OF REAL PROPERTY

CHAPTER XLVI

THE FORMATION OF THE RELATION OF LANDLORD AND TENANT

647. The principles involved in leases and sales of real property are somewhat similar to those relating to bailments and sales of personal property. For example, by virtue of a bailment, the bailee gets possession of personal property; by virtue of a sale of personalty he acquires the ownership of it. We may draw a similar distinction between leases of real property, which will be considered in Part III, and sales of real property, which will be considered in Part IV. Under a lease, the lessee usually gets possession of the leased property, but not the ownership and title. When a valid sale of real property is made the purchaser gets title, but he may or may not go into immediate possession.

648. Certain long leases require special formality. A short contract of lease, however, may usually be made by conduct, by word of mouth, or by writing. These three methods of forming the relation of landlord and tenant will be considered in the order named.

(A) Contracts of lease implied from the conduct of the parties

649. The rule that a contract need not be formed by written or spoken words, but may simply appear from the

actions of the parties, applies in certain cases to the relation of landlord and tenant. In general, the owner of land may recover compensation from the person who occupied it, where the situation is such that an agreement may fairly be implied on the latter's part to recognize the title of the owner.

STERRITT *v.* WRIGHT, 27 Pa. 259 (1856). Peter Wright had the use for several years of a farm belonging to his father-in-law, David Sterritt. After Wright had occupied the farm for four years, Sterritt sued him on an implied contract to pay rent. *Held* that Wright must pay a reasonable rent for the farm, unless he could prove that he was to occupy it gratuitously. This is based on the general principle that when one person receives anything of value from another the courts will imply a promise that he will pay what it is worth, unless the circumstances forbid them to draw such inference.

(B) Leases by word of mouth

650. In most states the statutes of frauds require leases for more than a year to be in writing, although oral leases for a shorter period are usually binding. As a matter of business prudence, however, it is wise to put all leases in writing. See Section 151. The ordinary printed or written forms of lease contain many terms which cannot be conveniently mentioned in a verbal agreement.

(C) Written or printed leases

651. It makes no difference whether the terms of a lease are written or printed, for they are presumed in either case to express the intention of the parties. Where the lease is for a longer term than three years it is often required to be made by an instrument under seal. Both parties should sign the contract which should be executed in duplicate. The tenant should insist on receiving a copy of the lease, executed in precisely the same way as the

copy which the lessor gets. The statutes of most states provide that leases exceeding a certain time shall be recorded in a designated local office in the county or district in which the land lies. Leases for more than one year must be recorded in California, Connecticut, Florida, Hawaii, Idaho, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Vermont. Leases for more than two years must be recorded in Rhode Island. In Indiana, New York, North Carolina, Ohio, Tennessee, Wisconsin, and Wyoming, leases for more than three years must be recorded. In Kentucky, Virginia, and West Virginia, leases for more than five years must be recorded. In Maine, Maryland, Massachusetts, and New Hampshire the period is seven years. In Delaware and Pennsylvania leases for more than twenty-one years should be recorded.

The following is a form of lease:

THIS INDENTURE, Made the *first* day of *September* in the year of our Lord, *one thousand nine hundred and nine*,

BETWEEN *James Cleveland*, of *the City of Atlantic City, in the County of Atlantic and State of New Jersey*, of the first part, and *Lewis Betz*, of *the City of New York, in the County of Queens, and State of New York*, of the second part,

WITNESSETH, that the said party of the first part hath let, and by these presents doth grant, demise and let unto the said party of the second part *all that cottage dwelling house known as No. 3516 Pacific Avenue, in the City of Atlantic City, and State of New Jersey*, with the appurtenances, for the term of *one year* from this date, at the rent of *Ninety Dollars ($90) per month* to be paid in advance, on the first day of each and every month beginning the day of the date hereof.

PROVIDED, that if any rents shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-

enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

And the said party of the second part doth hereby covenant and agree to and with the said party of the first part, to pay the said yearly rent in the proportions and upon the conditions aforesaid; and not to underlet the said premises, or any part thereof, or to permit any person or persons to occupy the same, or any part thereof, or to use or permit any part thereof to be used for any other purpose than a dwelling house, or to make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also, at the expiration of said term, to yield up and surrender possession thereof, with the appurtenances, in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear thereof and accidents happening by fire or other casualties excepted.

And the said party of the first part doth covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may, peaceably and quietly, have, hold, and enjoy the said demised premises for the term aforesaid.

In Witness Whereof, the said parties have interchangeably set their hands and seals hereto the day and year first above written.

Signed, sealed, and delivered in the presence of } [*Signed*] James Cleveland (seal)

[*Signed*] M. Deane Pressey } [*Signed*] Lewis Betz (seal)

(D) Precautions to be observed by the tenant

652. Where the buildings erected on leased premises are accidentally destroyed, as by fire, riot, tempest, or other cause, the tenant usually continues liable to pay rent, unless specially protected by the terms of the lease. There-

fore, he should generally insist upon the insertion of a clause in the lease providing that his liability for rent shall cease in case of the destruction of the buildings. See Sections 651 and 663.

EXCEPTION. This rule does not apply where apartments in a building are leased without carrying any interest in the land. But in order to relieve the lessee of apartments of his liability to pay rent, they must not merely have been rendered untenantable by reason of fire or other casualty but must have been totally destroyed.

QUESTIONS

1. Define lease. Lessor. Lessee. In what three methods may the relation of landlord and tenant be created?
2. What leases are required to be in writing?
3. Who should sign a lease? Should it be recorded? What precaution should be observed by the tenant?

CHAPTER XLVII

THE LANDLORD'S RIGHTS

653. The chief object that the landlord usually has in view is that of obtaining a return or profit from the tenant for the use of the leased premises, called rent. Unless the lease provides otherwise or the custom of the place fixes a different time, rent is payable at the end of the term of the lease. Landlords, however, generally insert a provision in their leases that rent shall be payable in installments on the first day of certain monthly, quarterly, or yearly periods. It is usual also to provide that rent shall be payable at whatever place the landlord may designate. Where the lease is silent on the subject, it is payable on the leased premises, and the landlord must go there for his money. If the rent is due and the tenant does not pay it, the landlord may sue for it, as in the case of every other broken contract. But he should first make demand for it on the premises, unless the agreement is that it shall be paid elsewhere.

(A) The right to distrain

654. In addition to the landlord's right to sue for the rent, he has in most states the right to distrain. This right enables the landlord, when the rent is in arrears, to enter the leased premises and sell personal property found there to satisfy his claim. The general rule is that all goods and chattels found on the leased premises, even those of a stranger, are subject to distress for rent. But there are many exceptions to this rule, and the tendency is to restrict

the landlord's right to distrain. In Alabama, the District of Columbia, Georgia, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New York, North Carolina, Utah, and Wisconsin, the right of distress does not exist.

(B) Where the tenant holds over

655. Most leases provide that if neither the tenant nor the landlord gives certain notice of an intention to terminate the lease, it shall be extended for a further named period. If the tenant holds over under this clause, he is held to be subject to all the conditions of the lease which are applicable to the renewed tenancy. Where there is no provision for holding over in the lease, the landlord usually has the option of treating a tenant who remains in possession either as a tenant for a full year by reason of his holding over, or as a trespasser. If the landlord duly notifies his tenant of an intention to terminate the lease, the tenant who holds over after the expiration of his term becomes a trespasser.

656. Upon the expiration of a lease, it is the tenant's duty to vacate the premises. He should, therefore, be careful to move out on time. Holding over by a subtenant after the expiration of the term has the same effect as a holding over by the original tenant, and the landlord may, therefore, usually hold the latter for another year.

(C) The tenant's duty of loyalty

657. The tenant owes a certain duty of loyalty to his landlord. This duty precludes him while in possession of leased premises from denying the title of his landlord. But while he is forbidden to assert that his landlord never had any title, he may prove that, since he became a tenant, the landlord has ceased to hold title.

QUESTIONS

1. When and where is rent payable?
2. What is the right to distrain? What is subject to distress for rent?
3. What is the effect of holding over by the tenant? By subtenants?
4. May the tenant deny the landlord's title?

CHAPTER XLVIII

THE TENANT'S RIGHTS

(A) The condition of the premises

658. The tenant has usually no right to demand of his landlord that the leased premises shall be in fit condition for the purposes for which they are rented, unless the landlord has agreed to put them in such condition. The same principle applies as in the case of sales of personal property. The lessee takes the risk, and he should examine the premises he intends to lease, and determine from his own inspection whether or not they are suitable for his purpose.

FRIEDMAN *v.* SCHWABACKER, 64 Ill. App. 422 (1896). H. and J. Schwabacker rented a store and basement from Samuel Friedman. The Schwabackers defended an action by Friedman for rent on the ground that the leased premises were in such filthy and unsanitary condition as to be untenantable. *Held*, the Schwabackers were liable for the rent. Although they had not inspected the premises before leasing them, they signed a lease wherein they stated that they received the premises in good repair and agreed to keep them in repair at their own expense. There was no implied contract on the part of Friedman that the leased premises were tenantable or that they would continue to be so during the term. The Schwabackers took the premises as they found them, and had to hold them subject to the provisions of their lease.

659. But where there are concealed defects in the leased premises which might be dangerous to the tenant and which are known to the landlord, he may be liable if he does not disclose such defects to the tenant and injury results to the tenant by reason thereof.

(B) The right to peaceful occupancy

660. In most leases, in the absence of a special provision to the contrary, a covenant or promise will be implied on the landlord's part that the tenant shall have quiet and uninterrupted enjoyment of the premises undisturbed by the landlord himself or by anyone having a better title than the landlord.

661. The tenant's right to quiet enjoyment is clearly infringed if he is put out of possession of the leased premises. And in general, anything of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the leased premises will be regarded as an invasion of the tenant's rights.

(C) As regards repairs

662. Unless the landlord has expressly contracted to make repairs on the leased premises, the tenant cannot compel him to do so. The tenant cannot, therefore, in the absence of any express agreement, make repairs at his own expense and either charge them to the landlord or deduct their cost from the rent. Where the landlord voluntarily makes repairs, the law will not imply a contract on his part to continue doing so.

663. It is generally considered the tenant's duty to make ordinary repairs. Most leases, therefore, contain a covenant on the part of the lessee to repair, whereby he is bound to deliver up the premises at the end of the term in as good order and condition, reasonable use and unavoidable casualties excepted, as when received from the lessor. The tenant should be careful about the wording of a covenant of this character which is inserted in his lease. If he binds himself to repair, he may find in case of the total destruction of the building by fire, tempest, or any other cause than the act of the landlord, that he has

obligated himself to rebuild. If the lease binds the tenant "to return and redeliver the house at the end of the term, in good order and condition, reasonable wear and tear only excepted," he would have to rebuild in case of the destruction of the property by fire. A well-drawn lease should, therefore, in addition to providing for abatement of the rent in the event of fire or other casualty, exempt the tenant from liability to return the premises in good condition in the event of fire or other calamity. See Section 652.

(D) To remove fixtures and other improvements

664. Fixtures are defined as personal chattels which have been attached or affixed to real estate by a tenant. In most states fixtures put in by a tenant are removable by him, provided he does so while lawfully in possession of the leased premises. As a rule he may remove trade, ornamental, and domestic fixtures, if he can do so without injuring the premises.

QUESTIONS

1. Is there any implied warranty of the condition of the premises in a lease of real property? What is the rule with regard to the landlord's liability in case of concealed defects in the premises?
2. What is the tenant's right to quiet enjoyment? How is this right infringed?
3. Whose duty is it to make repairs?
4. What covenant with regard to repairs is usually inserted in leases?
5. What are fixtures? Are they removable?

SALES AND MORTGAGES OF REAL PROPERTY

CHAPTER XLIX

CONTRACTS TO SELL AND CONVEYANCES OF REALTY

665. In sales of real estate two documents are usually prepared and executed. The first is the agreement to sell, and the second is a conveyance in performance of the agreement. The conveyance carries out the agreement of sale, and transfers the legal title to the purchaser. The transfer usually takes place at the moment when the deed is delivered to the purchaser.

(A) The formation of a contract to sell realty

666. The statutes of the various states require contracts for the sale of realty, or of any interest therein, to be in writing, and signed by the seller or his agent. See Section 150. Such contract is not a conveyance of the land, but merely an agreement to convey it at some future time. It is advisable to have the contract of sale recorded, if the buyer feels that the seller may disregard the contract and convey the property to some third party. If the contract is to be recorded, it should be acknowledged by the seller before a notary or other similar official.

667. After a party has agreed to buy land, the next step is for him to assure himself that the seller has a good

title. He must not only make sure that the person who has agreed to sell really owns the property, but also that no third parties have any claims or liens against the property by means of judgments against the owner or otherwise. This is done by having a lawyer, conveyancer, or title company search the records in the public offices where deeds, mortgages, and other important papers pertaining to real estate are recorded, and prepare an abstract or brief of title and a certificate of search showing all such matters so far as they affect the property. This abstract will inform the purchaser of any defects in the way of the seller's conveying a perfect title. The buyer may usually refuse to perform the contract if the search shows that the seller cannot give him a good and marketable title. Generally it is wise for him, if possible, to have the title insured by a company which issues insurance policies of this kind.

(B) The performance of a contract to sell realty by executing and delivering the deed and making settlement

668. When the parties are ready to perform the contract, the purchaser should see that the formalities of signing, sealing, attestation, acknowledgment, and delivery are complied with, and, where United States revenue stamps are necessary, that these are affixed in the proper amounts.

669. It is a general requisite to the validity of deeds conveying real estate that they shall be signed by the party making them or his duly authorized agent. If the grantor is unable to write, he may sign by "making his mark." Where the deed is executed by an agent, his authority should be evidenced by an instrument of equal dignity with that which he is authorized to execute. The power of attorney to execute a deed should, therefore, be signed, sealed, and acknowledged with the same formality as would the deed of conveyance itself. Deeds made by a corpora-

tion should be signed in the corporate name by the president or other proper officer, and the corporate seal should be affixed and attested by the secretary or other designated officer.

670. In most states a seal is necessary to render valid even a private person's deed. Strictly speaking, a seal is an impression on wax or other tenacious substance. Now the word "seal," the letters "L. S.," or even a mark will usually be recognized as a seal if it is clear that a party intended to adopt it as his seal. In some states the distinction between sealed and unsealed instruments has been abolished, the modern tendency being to dispense with the use of the seal as much as possible. But while in some states it is not necessary that a deed shall be sealed by the party making it, no harm will be done by having the grantor's seal affixed. See Sections 58 and 61.

671. Generally, in order that a deed may be recorded, it is necessary that it be attested by one or more witnesses. No person having a direct interest in the conveyance may validly be an attesting witness to it. In addition to the common requirement of attestation, it is usually necessary that the grantor shall acknowledge the instrument. Acknowledgment is the declaration before a competent officer or court by one who has executed an instrument that it is his act and deed.

672. After a deed has been duly signed, sealed, attested, and acknowledged, the next formality is that of delivery. The deed operates to transfer title only when it is delivered to the grantee. When a deed is handed to a third party to be delivered to the grantee upon the performance of a certain condition, it is said to be delivered in escrow. The title then passes on the performance of the condition and the delivery of the deed to the grantee by the third party. Delivery to the grantee is ordinarily made when he pays for the property or gives security for payment.

This is called " the settlement," and marks the fulfillment of the contract of sale.

673. If the premises to be conveyed are leased, the purchaser is bound to take notice that they are occupied by a tenant. An agreement of sale usually provides that rent shall be apportioned between the seller and the buyer as of the date of settlement.

(C) The necessity of recording

674. Statutory provision is made in every state for the registration or recording in a designated local office of deeds, mortgages, and other documents concerning land. The effect of the recording of instruments which are entitled to be recorded is to give the whole world legal notice of their existence. Everyone is bound to know that the deed or other instrument is on record, even though he has no actual knowledge of the fact. Failure to record a deed or mortgage does not affect its validity as between the immediate parties. If the grantee does not record his deed, it is void as against anyone who subsequently purchases the same property in good faith, and who has had no means of learning about the previous conveyance.

QUESTIONS

1. Need contracts for the sale of interests in realty be in writing?
2. What precaution should be taken by a person who is about to buy real property?
3. What is the buyer's right if the seller cannot give a clear title?
4. What formal requisites are essential to the validity of a deed?
5. How may a deed be signed? May it be signed by the seller's agent?

6. How are deeds made by corporations signed? Need a deed be sealed? What is the rule with regard to the attestation of deeds? What is an acknowledgment? What is delivery? What is delivery in escrow? What is the effect of recording deeds? What is the effect of failure to record deeds (*a*) as between the immediate parties, (*b*) as against a subsequent purchaser of the same property without knowledge of the previous conveyance?

CHAPTER L

RIGHTS AND OBLIGATIONS OF THE PARTIES TO A SALE OF REALTY AFTER TITLE HAS PASSED

(A) Obligations of the seller toward the buyer

675. The obligations of the seller of real property toward the buyer after title has passed depend upon the nature of the deed of conveyance. Broadly speaking, there are two kinds of deeds: (1) the quit-claim deed and (2) the warranty deed.

1. Quit-claim deeds

676. By a quit-claim deed the seller does not represent to the buyer that he has any title whatever, but merely conveys to the buyer any " right, title, or interest " which he may have in the premises. If it turns out that the seller had a defective title, the buyer seldom has any right of action against him. Sometimes the seller will insert in a quit-claim deed a covenant of special warranty, by which he represents to the buyer that he has not himself done or knowingly permitted to be done anything which would injure his title to the property.

677. A form of quit-claim deed is shown on page 340.

2. Warranty deeds

678. In a warranty deed the seller may make any one or all of the following four covenants: (1) of seisin and of his right to convey; (2) that the land is free from encumbrances; (3) of peaceable enjoyment; (4) for further assurance.

THIS INDENTURE, made the *fifteenth* day of *September* in the year *one thousand, nine hundred and nineteen.*

BETWEEN *Henry W. Middleton and Sarah Jane, his wife, of the City of Camden, in the County of Camden, and State of New Jersey,* parties of the first part, and *Albert Waterman, of the same place,* party of the second part,

WITNESSETH, that the said parties of the first part, in consideration of the sum of one dollar, lawful money of the United States, paid to them by the party of the second part, do hereby remise, release, and forever quit-claim unto the said party of the second part, his heirs and assigns forever.

ALL *that certain messuage or tenement and lot or piece of ground situate on the east side of Ninth Street at the distance of one hundred and ninety-eight feet northward from the north side of Atlantic Avenue in the City of Atlantic, County of Atlantic and State of New Jersey, being part of Lot No. 19 in said City, bounded and described as follows, to wit: Beginning at the east corner of land owned by Isaac W. Kaighn and running thence north twenty-eight and one-half feet; thence east to the east line of Lot No. 19; thence south to land owned by Joseph C. Armitt; thence south to the center of said Ninth Street and thence west to the place of beginning,*

TOGETHER with the appurtenances and all the estates and rights of the parties of the first part in the said premises, to have and to hold the above-described premises unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
[*Signed*] FRANCIS X. HALL

[*Signed*] HENRY W. MIDDLETON (SEAL)
[*Signed*] SARAH JANE MIDDLETON (SEAL)

STATE OF NEW JERSEY
ATLANTIC COUNTY } *ss.:*

BE IT REMEMBERED, That on this *fifteenth* day of *September*, in the year of our Lord *one thousand nine hundred and nineteen*, before me, a Commissioner of Deeds, personally appeared ***Henry W. Middleton and Sarah Jane, his wife***, who, I am satisfied are the grantors named in the above Deed of Conveyance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed; and the said *Sarah Jane Middleton*, being of full age, on a private examination apart from her said husband, before me acknowledged that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband. All of which is hereby certified.

[COMMISSIONER'S OFFICIAL SEAL] [*Signed*] ADOLPH T. CASEY

679. The first covenant in a warranty deed is that of seisin and of the right to convey, whereby the seller represents to the buyer that he has title to the premises which he undertakes to sell. This covenant is satisfied if the seller is in lawful possession of the premises either by himself or by another. It would be broken, however, if the seller undertook to convey the entire property and it turned out afterwards that he was only a half owner of it.

680. The second covenant is that against encumbrances, whereby the seller represents to the buyer that there are no outstanding rights in third persons to the land conveyed which would lessen the value of the property. This covenant would be broken if it appeared after the delivery of the deed that there was an outstanding mortgage against the property.

681. The third covenant is that of peaceable enjoyment, by which the seller guarantees to the buyer that he

shall not be disturbed in his enjoyment of the property. By a general warranty the seller guarantees that the buyer shall not be disturbed by any persons whomsoever. By a special warranty he guarantees the buyer merely against particular persons, generally against the seller himself or anyone claiming under him.

682. The fourth covenant is that of further assurance, whereby the seller guarantees to the buyer that he will perform such further acts as may be necessary to remove any defects subsequently appearing in the buyer's title.

683. In the case of a breach of any of these covenants, the buyer has the right to hold the seller for whatever damages he may suffer by reason of such breach. The following is a form of deed containing the four covenants set forth, with a clause of general warranty.

THIS INDENTURE, Made the *twenty-seventh* day of *October* in the year *one thousand nine hundred and twenty-six.*

BETWEEN *Henry Wood,* of *West Point, Orange County, New York,* party of the first part, and *John J. Wurts,* of *Freehold, Greene County, New York,* party of the second part,

WITNESSETH That the party of the first part in consideration of the sum of *Six Thousand Five Hundred* (*$6,500*) *Dollars,* lawful money of the United States, paid by the party of the second part does hereby grant and release unto the party of the second part, his heirs and assigns forever,

ALL *that tract or parcel of land situate in the City of Albany, County of Albany and State of New York, situate on the easterly side of Pemberton Street at the distance of one hundred and twenty-eight feet northward from the northerly side of Master Street containing in front or breadth on Pemberton Street eighteen feet and extending of that width in length or depth eastwardly between lines parallel with said Master Street twenty-seven feet and four inches.*

TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to the said premises,

To Have and to Hold the above granted premises unto the party of the second part, his heirs and assigns forever.

And the said *Henry Wood,* party of the first part, covenants with the said *John J. Wurts,* party of the second part, as follows:

First. That the party of the first part is seized of the said premises in fee simple and has a good right to convey them.

Second. That the said premises are free from encumbrances.

Third. That the party of the first part will forever warrant and defend the title of the party of the second part to the said premises against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises.

In Witness Whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

[*Signed*] Henry Wood (seal)

Sealed and delivered in the presence of
[*Signed*] James A. Reed
[*Signed*] George S. Bryant

City of New York,
County of Kings, } *ss.:*
State of New York.

This *twenty-seventh* day of *October* in the year *nineteen hundred and twenty-six,* before me, the subscriber, personally appeared *Henry Wood,* to me personally known to be the same person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same.

[*Signed*] Howard Thompson,
(notarial seal) Notary Public of Kings County, N. Y.

(B) Obligations of the buyer toward the seller

684. When property is conveyed it is frequently sold "subject" to an existing mortgage. This does not have the effect of making the purchaser of the property personally liable for the amount of the mortgage debt, unless he expressly assumes such liability. The land is the security for the payment of the debt, and the purchaser is bound to recognize the mortgage as a valid charge against the land. The purchaser gets merely the equity of redemption, the difference between the value of the property and the amount of the mortgage debt. After he transfers the property to a third party, he is no longer interested in its payment.

685. Until the seller's deed is delivered he retains a lien on the real estate for the purchase money, unless he expressly waives it. This rule is similar to the one concerning the sale of personalty, namely, that the seller before delivering possession of the personalty usually retains a lien on it for the purchase money. The delivery of the deed, which represents the title and ownership, roughly corresponds to the manual delivery of tangible articles of personal property.

QUESTIONS

1. What is a quit-claim deed?
2. What is a covenant of special warranty?
3. What covenants are contained in a general warranty deed?
4. Define and discuss each of these covenants.
5. What is the effect of selling property subject to an existing mortgage?
6. What is the seller's lien?

CHAPTER LI

MORTGAGES OF REALTY

686. A mortgage is a conveyance of land as security for the performance of an obligation, generally the payment of a debt, with a provision that the conveyance shall be void upon the performance of the obligation. The person who gives the mortgage is called the mortgagor, and the person to whom it is given is called the mortgagee. In general, any interest in real property which may be sold may also be mortgaged. While mortgages have to do with interests in land, the mortgages themselves are personal property.

687. The usual form of mortgage is similar to an ordinary deed of conveyance with the addition of a clause of defeasance. This clause provides that the conveyance shall be void upon the performance of certain conditions, generally the payment of the mortgage debt. Mortgages are usually executed with the same formality required in the case of deeds.

(A) Obligations of the mortgagor toward the mortgagee

688. It is the duty of the mortgagor to pay the interest due under the terms of the mortgage upon the day called for, together with taxes and other assessments which may be levied upon the property. The mortgagor has an insurable interest in the premises, and is in many cases obliged, under the terms of the mortgage, to keep the buildings insured against fire for the benefit of the mortgagee to the amount of the mortgage debt.

689. For a breach of any of the conditions of the mortgage, such as a failure to pay the interest, taxes, or other charges against the property within a certain time after the same shall fall due, or the failure to pay the mortgage debt, the mortgagee has the right to foreclose. Foreclosure is the means whereby the mortgagee applies the mortgaged premises, which have been conveyed as security, to the payment of his debt. The usual form is a legal proceeding by which the property is sold and the proceeds applied to the liquidation of the debt. If anything remains after the mortgagee has been paid the debt, with interest and legal costs, this surplus is turned over to the mortgagor.

(B) Obligations of the mortgagee toward the mortgagor

690. Ordinarily, the mortgagor may remain in possession of the premises until he has broken some condition of the mortgage and it has been foreclosed. But if the mortgagee goes into possession of the mortgaged premises before breach of condition by the mortgagor, he is obliged, upon payment of the mortgage or upon the termination of the foreclosure proceedings, to account to the mortgagor for the rents and profits of the land. He should ordinarily apply them to the reduction of the mortgage debt. If the mortgagee does not manage the mortgaged premises carefully, but incurs loss by reason of renting them to a bad tenant, he may be liable to the mortgagor for the fair rental value of the property. A mortgagee who occupies the premises himself must pay the mortgagor a fair rental value or credit him with the same on account of the mortgage debt.

691. When the mortgagee forecloses on account of the mortgagor's nonperformance of some specified condition, the property is sold and the proceeds applied to the satisfaction of the mortgage debt. When the foreclosure proceeding is carried out to a conclusion, the mortgagor loses all his title and right in the property.

THIS INDENTURE, made the *twentieth* day of *July, one thousand nine hundred and nine,*

BETWEEN *William Carr, teamster, single man,* of *the City of Newark, County of Essex and State of New Jersey,* party of the first part, and *George Moffat, banker,* of *the same place,* party of the second part,

WHEREAS, the said party of the first part in and by his obligation or writing obligatory under his hand and seal duly executed bearing even date herewith, stands firmly bound to the said party of the second part in the sum of *Six Thousand Dollars* ($6,000), lawful money of the United States of America, conditioned for the payment of the just sum of *Three Thousand Dollars,* lawful money as aforesaid, at the expiration of *five* years from the date hereof, together with interest thereon, payable semiannually at the rate of *five* per cent. per annum, without any fraud or further delay.

NOW this indenture witnesseth that the said party of the first part as well for and in consideration of the aforesaid sum of *Three Thousand Dollars* and for the better securing the payment of the same with interest as aforesaid, unto the said party of the second part, his executors, administrators and assigns and also for and in consideration of the further sum of one dollar unto him in hand well and truly paid by the said party of the second part at and before the ensealing hereof, the receipt whereof is hereby acknowledged, does, by these presents grant and release unto the said party of the second part, his heirs and assigns forever,

ALL *that tract or parcel of land, situate in the City of Camden, in the County of Camden and State of New Jersey, bounded and described as follows: Beginning at a point in the northerly edge of Pacific Street, distant one hundred feet easterly from the northeasterly corner of Fourth and Pacific Streets, thence* (1) *northwardly parallel with Fourth Street one hundred and fifty feet to the line of lot No.* 13; *thence* (2) *eastwardly parallel with Pacific Street thirty-one feet; thence* (3) *southwardly parallel with Fourth Street one hundred and fifty feet to the northerly edge of Pacific Street; thence* (4) *westwardly along and in the said northerly edge of Pacific Street thirty-one feet to the place of beginning.*

Together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises.

To Have and to Hold the above-granted premises unto the said party of the second part, his heirs and assigns forever.

Provided Always, nevertheless, that if the said party of the first part, his heirs, executors, administrators, or assigns do and shall well and truly pay or cause to be paid unto the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid principal sum of *Three Thousand Dollars* on the day and time hereinbefore mentioned and appointed for payment of the same together with interest as aforesaid that then and from thenceforth as well this present indenture and the estate herein granted as the said recited obligation shall cease, determine and become void, anything hereinbefore contained to the contrary notwithstanding.

And the said party of the first part covenants with the party of the second part as follows:

That the party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in payment as aforesaid, the party of the second part shall have power to sell the premises herein described, according to law.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

In the presence of
[*Signed*] James Casey } [*Signed*] William Carr (seal)

State of New Jersey
County of Camden } *ss.:*

On this twentieth day of July, in the year one thousand nine hundred and nine before me, the subscriber, personally appeared William Carr, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

[*Signed*] Charles A. Hogan,
Commissioner of Deeds in and
for the State of New Jersey.

[seal of commissioner of deeds]

My commission expires February 2, 1912.

692. A mortgage will be discharged by the mortgagor's performance of all the specified obligations, usually the payment of the mortgage debt with interest. When the mortgage has been paid, it should be satisfied of record in the public office wherein it was originally recorded.

A form of mortgage is shown on pages 347 and 348. As indicated therein, it is security for the payment of a bond or a note. The bond or the note is deemed the primary instrument to which the mortgage is auxiliary. No form of bond or note is here shown: the form varies widely in the various states.

QUESTIONS

1. What is a mortgage? What is the usual form of mortgage? How are mortgages usually executed?
2. What are the duties of the mortgagor to the mortgagee?
3. What is foreclosure?
4. Who ordinarily has possession of mortgaged premises?
5. How may a mortgage be discharged?

BOOK FOURTH

SURETYSHIP AND GUARANTY, AND INSURANCE

SURETYSHIP AND GUARANTY

CHAPTER LII

THE NATURE AND THE FORMATION OF SURETYSHIP AND GUARANTY CONTRACTS

(A) Nature of the contract

693. A contract of suretyship is defined as an agreement whereby one person engages to be answerable for the debt, default, or miscarriage of another. A contract of guaranty is defined as a promise to answer for some debt or the performance of some duty in case the person who is first liable to pay or perform cannot do so. Suretyship is the broader term. Every guaranty is a contract of suretyship, in so far as it is an agreement to answer for the default of another.

1. Such contracts distinguished from original undertakings

694. An original undertaking must be carefully distinguished from a contract of suretyship or guaranty. One entering into an original undertaking assumes liability for the performance of his own part of the transaction, while a contract of suretyship or guaranty is an agreement to answer for the debt or default of another. The original undertaking involves a primary liability; the contract of

suretyship or guaranty involves only a secondary liability depending upon the default of another who is primarily liable.

Dickinson *v.* Colter, 45 Ind. 445 (1874). Dickinson executed to Colter his written agreement, which, after reciting that Colter was about to appoint Berry his agent for the sale of grain and to furnish him with money for that purpose, continued: "I hereby become responsible to said Colter and agree to pay him all money that he may advance to said Berry and that may be due him from Berry from time to time by reason of such advances." *Held* that Dickinson's liability was original, primary, and absolute. He unconditionally agreed to pay Colter all moneys which the latter might advance to Berry.

Dole *v.* Young, 24 Pick. (Mass.) 251 (1837). The following writing was signed and addressed to Dole by Young: "Please send Amos Wetherbee goods to the amount of $100 and I will guarantee the same in four months." Immediately after the presentation of the writing Dole delivered goods to Wetherbee. This suit was brought to recover the price of the goods from Young. *Held* that Young was liable. The writing was not an original undertaking, but a collateral agreement to pay, in case Wetherbee did not. It was, therefore, a contract of guaranty of Wetherbee's debt.

2. Suretyship distinguished from guaranty

695. A suretyship obligation is a direct liability assumed by a third person to the obligee for the act to be performed by the principal obligor, while a guaranty creates a liability only for the principal's ability to perform the act. The contract of suretyship puts the surety under an immediate obligation that the act shall be done. The contract of guaranty is a separate contract in the nature of a warranty that the principal obligor is able to perform. Thus, a debtor's surety undertakes to pay if the debtor does not, while a guarantor undertakes to pay if the debtor cannot. The surety is an insurer of the debt, while the guarantor is an insurer of the debtor's solvency.

(B) Formation of the contract

1. Offer and acceptance

696. This first contractual element is treated at length in Chapter III. The general rule is that an offer to become surety or guarantor must be accepted before a contract of suretyship or guaranty is formed. But in this, as in other contracts, the nature of the undertaking and the situation of the parties should be borne in mind. Where the offer of guaranty is based upon a mere letter of credit, and the guarantor has no means of knowing whether or not his offer has been accepted and the extent of his liability, mere acting upon the offer is not a sufficient acceptance. The guarantor must be notified within a reasonable time. But where the guaranty is for the payment of a preëxisting debt or for the performance of any other contract already made, and is entered into on account of a new consideration passing from the creditor to the guarantor, direct notice of acceptance is not ordinarily necessary. Acting on the offer is usually sufficient acceptance, although it is wise to give explicit written notice of the acceptance.

Wright *v.* Griffith, 121 Ind. 478 (1889). Mrs. W. E. Headington applied to Griffith to purchase merchandise on credit. He refused, but when her father, Wright, wrote Griffith as follows, "I will stand good for the money to settle her bills," Griffith furnished her the merchandise requested. In a suit to recover the purchase price, the defense was that Wright had not been notified of Griffith's acceptance of his offer. *Held* that Wright was liable. His letter was not a mere overture, but the final consummation of a pending arrangement, in pursuance of which Griffith furnished Mrs. Headington with merchandise. When the guaranty is executed contemporaneously with, and as a part of the consideration for, the contract guaranteed, no notice of the acceptance of the guaranty is required.

2. Seal and consideration

697. This topic is treated in Chapter IV. Like all other contracts, contracts of suretyship and guaranty must be under seal or supported by a consideration. Consideration may consist of some advantage to the principal obligor or the surety, or some disadvantage to the obligee. It is advisable to have a suretyship or guaranty contract under seal, lest a question be raised as to the consideration sustaining the surety's or guarantor's promise. But see Section 61.

3. Capacity of parties

698. This topic is treated generally in Chapter V. The suretyship and guaranty contracts of a minor are, like his other contracts, voidable by him at his option when he reaches full age. If an insane or intoxicated person enters into a contract of suretyship or guaranty, the agreement is seldom binding upon him. In states where the disability of coverture has been entirely removed, a married woman may make a contract of suretyship or guaranty just as if she were single. In most states, however, her power to make contracts of this kind is restricted by statute; by denying her the power, either altogether or else merely in a particular case, as, for example, where she is not allowed to become surety or guarantor for her husband.

4. Reality of consent

699. The contract of suretyship or guaranty involves the utmost good faith. When a man undertakes to go security he has a right to expect the fairest treatment. If he is deceived by any material misrepresentation or any improper concealment substantially affecting the transaction, and the obligee knows of such misrepresentation or concealment, he cannot hold the surety or guarantor. See Section 114.

FRANK FEHR BREWING CO. *v.* MILLICAN, *et al.*, 66 S. W. (Ky.) 627 (1902). Frank Fehr Brewing Company contracted with L. T. Millican to furnish beer at a stipulated price. Millican was to pay for all beer sold within thirty days after delivery. J. S. Millican and J. A. Lyddane were his sureties for the faithful performance of his contract. After the contract had run about four months, Lyddane inquired of the brewing company as to the standing of L. T. Millican's accounts. The brewing company replied that everything was "O. K.—that Millican owed only $400." In fact he was months behind in his payments and owed over $1,600. When Millican failed the company sued his two sureties. *Held* that the company could not recover. The fact that L. T. Millican had fallen behind in his accounts was of material importance. The brewing company's failure to reveal it when asked for information was a violation of good faith and vitiated the contract.

5. LEGALITY

700. If the undertaking of the principal is void, because it has an illegal object, the surety's or guarantor's undertaking is equally void. See Chapter VII.

6. SPECIAL FORMALITY

701. A contract to answer for another's debt or default should be in writing and signed by the party who is to be charged or his authorized agent. See Section 158. A verbal contract of suretyship or guaranty is usually unenforceable. But the requirement that the contract be in writing does not dispense with the necessity of a consideration, unless the instrument is under seal, and of the other elements required in all contracts.

7. AUTHORITY OF AGENTS AND PARTNERS

702. A person may make a contract of suretyship or guaranty through his authorized agent. But a creditor before accepting security from an agent who assumes to bind

his principal should make certain that the agent is duly authorized to enter into such contract. The agent's authority, however, need not be in writing.

703. The authority of a partner to bind the firm extends only to matters which are within the scope of the firm business. Therefore, the agency of one partner for the firm does not permit him to enter into contracts of suretyship and guaranty on behalf of the firm unless this is in the regular course of the firm's affairs, or unless he has been specially authorized to do so by his fellow partners.

QUESTIONS

1. Define suretyship. Define guaranty. In how far is a contract of guaranty one of suretyship?

2. Distinguish a contract of suretyship or guaranty from an original undertaking. Distinguish suretyship from guaranty.

3. Need notice of the acceptance of an offer to become surety or guarantor be communicated to the offeror? When is acting on the offer a sufficient acceptance?

4. Is consideration necessary in contracts of suretyship and guaranty?

5. May married women enter into contracts of suretyship or guaranty? May minors?

6. Ferguson is induced to become Weston's surety for the performance of a contract by reason of Weston's representation that he owns mining lands worth $250,000. In a suit by Rowsey, the obligee, Ferguson proves that Weston's representations were false in every particular. Which wins?

7. What special formality is required in contracts of suretyship and guaranty? Is a verbal contract of suretyship or guaranty enforceable?

8. May a person enter into a contract of suretyship or guaranty through an authorized agent?

9. What authority has a partner to bind his firm in matters of suretyship and guaranty?

CHAPTER LIII

RIGHTS AND OBLIGATIONS OF THE PARTIES

(A) Duties of the obligee toward the surety or the guarantor

1. To take action against the principal

704. A surety is directly and immediately liable to the obligee. It is, therefore, not necessary for the obligee to proceed against the principal obligor or to realize on collateral security before he can hold the surety liable, unless the terms of the contract expressly require him to proceed first against the principal or against the collateral security given by the principal.

King & Houston *v.* State Bank, 9 Ark. 185 (1848). Stephenson made his note to the State Bank. King and Houston were his sureties. In an action against King & Houston, their defense was that the bank had neglected to sue Stephenson until after he became insolvent. *Held*, they were nevertheless liable. The creditor's forbearance did not violate any of the rights of the sureties and was not a good ground of defense.

705. In many states, if a surety thinks he is in danger and notifies the obligee to proceed against the principal obligor, and the obligee disregards the notice, the surety will not be discharged, even though at the time of the notice the principal was solvent so that the obligee could have obtained his money by obeying the notice.

706. In Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Kentucky, Mississippi, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, Ten-

nessee, Texas, Virginia, Washington and West Virginia the surety may, if he is apprehensive that the principal is about to become insolvent or remove from the state without discharging the contract, demand that the obligee bring suit, declaring that unless this is done the surety's liability will cease. If the obligee fails to sue, the surety may be discharged.

Martin *v.* Skehan, 2 Colo. 614 (1875). Patrick Skehan was surety for the payment by Pierce Skehan of a promissory note held by Martin. Martin sued Patrick Skehan as surety. *Held*, as Patrick had requested Martin to proceed against the principal who was then solvent, he was exonerated by Martin's failure to do so, the principal afterwards having become insolvent.

707. When the contract is one of guaranty, the guarantor's liability does not usually arise merely upon the principal obligor's non-performance. Reference should always be had to the contract between the parties to ascertain what steps the obligee must take in order to fix the guarantor's liability. It may provide that the obligee shall pursue the principal obligor with diligence, and on failure to enforce performance inform the guarantor thereof.

708. When the guaranty is conditional and the guarantor undertakes to indemnify the obligee against loss by reason of failure to collect a debt, the obligee must exercise reasonable diligence in pursuing the principal to obtain payment. But if it is evident that legal proceedings against the principal would be useless by reason of his insolvency, the obligee need usually do no more than make demand for payment upon the principal, and, on being refused, may then proceed against the guarantor.

Dillman *v.* Nadelhoffer, 160 Ill. 121 (1896). Edward Knowlton made his promissory note to the order of John Nadelhoffer. Before it was delivered to Nadelhoffer, Lewis E. Dillman indorsed it as follows: "I guarantee the collection of the within

note. Lewis E. Dillman." Knowlton did not pay at maturity and Nadelhoffer sued him. Before he obtained judgment Knowlton became insolvent. Then Nadelhoffer sued Dillman, the guarantor. *Held* that Nadelhoffer could recover. Dillman's undertaking was to pay the debt on condition that Nadelhoffer should use the ordinary legal means to collect it from Knowlton diligently but without success. The insolvency of the principal debtor, Knowlton, excused Nadelhoffer's failure to prosecute the suit to judgment.

709. Where the contract is one of absolute guaranty, the guarantor is in most states liable immediately upon the principal's non-fulfillment of his obligation. No further steps, such as pursuit of the principal obligor or proof of his insolvency, are necessary to fix the guarantor's liability. Guaranty without the imposition of conditions is sometimes held to be an absolute undertaking.

Winchell *v.* Doty, 15 Hun (N. Y.) 1 (1876). Doty, on buying a horse from Winchell, offered in part payment a note made by Cartwright & Hoover, then four years past due. Winchell refused to accept it until finally Doty wrote on the back of it, "I guarantee the within note," and signed it. *Held* that this was a guarantee that payment would be promptly made and not merely that the note was collectible. It was an absolute undertaking and Winchell could sue and recover from Doty without first demanding payment of Cartwright & Hoover.

2. To give notice of the principal's default

710. From the nature of his obligation, a surety is not usually entitled to notice of the principal obligor's default. The surety has undertaken to become bound as the principal is bound, and accordingly the only thing the creditor need do in order to recover from the surety is to show that the principal has failed to fulfill his obligation.

Buchanan County *v.* Kirtley, 42 Mo. 534 (1868). Hugh Irwin contracted to build a bridge for Buchanan County and war-

ranted the bridge to stand for four years. Kirtley was his surety. Within the time named, the bridge became entirely unfit and unsafe. The county had the necessary repairs made and sued Kirtley to recover the cost. *Held* that Kirtley was liable. No written notice was required to be given to him to hold him responsible on his obligation. He was required to take notice of any breach that should occur and repair the same in conformity with his contract.

711. In a guaranty contract, whether or not notice is required depends upon the nature of the transaction. The contract itself may require notice. Or the circumstances may be such that the principal's default, while known to the party to whom the guarantor is liable, would not naturally be known to the guarantor. In such cases notice should be given. If a guaranty is conditional, failure to give the guarantor notice within a reasonable time of the principal debtor's default generally entitles the guarantor to defend an action on the guaranty to the extent that he has suffered damage by the omission. In an absolute guaranty, the guarantor's liability is coextensive with that of the principal debtor. Therefore, in such cases, proof of notice of the principal's default is not necessary to fix the guarantor's liability.

Reeves *v.* Howe, *et al.*, 16 Cal. 152 (1860). Hayward wrote on the back of a note drawn by Howe and Mayo and payable to Reeves or order: "I guarantee the collection of the within note when due. (Signed) A. Hayward." The note not being paid, Reeves sued Hayward as guarantor. *Held* that Hayward was entitled to legal notice of nonpayment before he could be held on his contract. His agreement was not original but collateral, and was a mere conditional promise to pay if the makers should not. He was entitled to notice of the principal debtors' default.

Rogers *v.* Burr, 97 Ga. 10 (1895). Burr was induced to subscribe for stock in the Barnesville Manufacturing Company upon the faith of a written agreement signed by Rogers, guaranteeing

an 8 per cent. dividend on the stock for a period of three years. She sued Rogers to recover the dividend. His defense was that she had never notified him of the company's failure to pay dividends. *Held* that the guaranty was absolute and unconditional, and no notice to the guarantor of his principal's default was required. It was Rogers's duty to know of the company's default, and he was, therefore, liable to Burr for the dividends guaranteed on her stock.

(B) Duties of the surety or the guarantor toward the obligee

712. The obligations of a surety or guarantor depend upon those of the principal obligor. The surety or guarantor is not bound to any greater extent than the principal. In order to learn the extent of the surety's or guarantor's liability, therefore, reference must be had to the contract between the principal obligor and the obligee. But it does not follow that the surety or guarantor is bound to the same extent as the principal, for his liability may be quite narrow under the terms of the contract.

1. Continuance of the obligation

713. A surety will usually continue liable for years unless he has fixed a time limit in his contract or unless a time may be implied when his liability will cease. If no such period is expressed or implied, the surety cannot usually get a release from liability without the obligee's consent.

714. Where it is clear from the terms of the contract or from the transactions of the parties that the guaranty is to cover a running account, it is a continuing guaranty. Where the contract does not mention the period for which it is to hold good, it is usually presumed to be made for the particular transaction in view, and after obligations to the amount then contemplated have been contracted, the surety or guarantor is not to be held further liable unless the contract clearly points to a continuance of liability.

2. Joint sureties or guarantors

715. Every surety is usually liable for the whole debt, no matter how many sureties there may be who are jointly bound, unless it is otherwise agreed. If one of several sureties pays the whole debt he may make the others contribute toward reimbursing him.

(C) Duties of the principal obligor toward a surety or a guarantor

716. When, at the principal obligor's request, one becomes liable as a surety or a guarantor, usually the principal is bound to compensate the surety or guarantor for any resulting loss. As soon as the surety or guarantor pays the obligee the amount due, he becomes entitled to receive from the principal what he has so paid. Upon payment by a surety or guarantor of the whole amount due the obligee, the surety or guarantor becomes entitled by operation of law to the obligee's rights against the debtor. This privilege, called the right of subrogation, is denied to volunteers and strangers who officiously intermeddle when they have no interests to protect and are under no obligation to pay.

QUESTIONS

1. Must an obligee sue the principal obligor before proceeding against a surety?

2. Is a surety discharged if, after he notifies the obligee, the latter fails to proceed against the principal obligor?

3. In a contract of guaranty must the obligee proceed against the principal before taking action against the guarantor: (a) where the contract is conditional; (b) where it is unconditional?

4. Is a surety entitled to notice of the principal's default?

5. When is a guarantor entitled to notice of the principal's default?

6. How may a surety secure a release from his obligation where no period has been fixed in the contract for its termination?

7. What is the usual rule as to the continuance of the obligation in a contract of guaranty where no period has been fixed for which it is to hold good?

8. Heineman, Clement, and Cleveland are sureties on Lawton's bond in the amount of $10,000. Lawton makes default and the creditor collects the entire amount from Heineman. What are Heineman's rights against his co-sureties?

9. Define subrogation. Is a surety or guarantor entitled to be subrogated to the creditor's rights against the principal when he has assumed the obligation without request from the principal debtor?

CHAPTER LIV

THE TERMINATION OF THE CONTRACT

717. Much of what was said in Chapters XIV to XVIII under the heading of Discharge of Contracts applies to contracts of suretyship and guaranty here being treated. The five ways of discharging contracts there discussed, namely, by agreement, performance, breach, impossibility, and bankruptcy, will here be used as a basis for treating the discharge of the contracts we are now considering. Statements made hereafter about a surety must be understood to apply also to a guarantor unless the context indicates otherwise.

(A) Discharge by agreement

718. The surety and the creditor may make an express agreement that the surety is no longer to be liable on his contract. Such an agreement must, however, be under seal or supported by a consideration. See Section 61. An agreement to discharge the surety is sometimes implied from the action of the creditor. Thus a voluntary discharge of the principal debtor discharges the surety also. But see sections 292 and 724.

(B) Discharge by performance

719. The surety will be released (1) by the debtor's performance of the undertaking, as by paying the debt where the contract relates to the payment of money, or (2) by the surety's performance of his contract of suretyship.

(C) Discharge by breach

720. Any material change in the contract between the principal debtor and the creditor, made without the surety's knowledge and assent, will discharge him from liability.

721. An extension of the time of performance granted by the creditor to the principal debtor will discharge the surety. But this extension must be under seal or based upon consideration, and must be made without the surety's consent. Granting an extension of time to the surety, however, or even releasing him altogether, does not affect the principal's liability. The rule with respect to the discharge of a surety by granting him an extension of time is usually also applicable to the guarantor. The extension, in order to have such effect, must be without the surety's or guarantor's consent, and must be for a definite time and made binding on the creditor by a seal or a consideration. But if a guaranty is conditional, mere delay on the creditor's part may release the guarantor. See Section 708.

(D) Discharge by impossibility

722. This is a matter of infrequent occurrence, and, therefore, of slight importance. The most obvious example would be a guaranty of the performance of personal services. If the party from whom performance was looked for was to die, his surety would be discharged, unless otherwise expressly provided.

723. The death of the surety does not usually terminate his liability. His estate is ordinarily bound. But the death of one of several joint sureties may release his estate, though the others remain bound.

(E) Discharge by bankruptcy

724. A surety may be released from his obligation by his own discharge in bankruptcy. But the discharge in bankruptcy of one of several co-sureties does not discharge the others. Neither does the principal debtor's discharge in bankruptcy release the surety.

QUESTIONS

1. Enumerate the five ways in which contracts of suretyship and guaranty may be discharged.

2. Need an agreement to discharge a surety be supported by a consideration? Will a surety be released by the debtor's performance of the undertaking? Give an illustration of the discharge of the contract by breach. What is the effect of granting an extension of the time for performance of the contract to the principal debtor in a contract of suretyship? In a contract of guaranty?

3. Give an illustration of the discharge of a contract of suretyship by impossibility of performance.

4. What is the effect of the surety's death on his contract?

5. What is the effect of the bankruptcy of the surety on his obligation? Of the bankruptcy of one of several co-sureties on the obligations of the others? Of the bankruptcy of the principal debtor on the surety's obligation?

INSURANCE

CHAPTER LV

FIRE INSURANCE

725. Insurance on property is a conditional contract whereby one party undertakes to compensate another for loss or damage to property arising from some contingent event. The principle of indemnity is at the basis of all contracts of property insurance.

(A) Who has an insurable interest?

726. The nature of the contract of insurance on property makes it necessary that the insured have some interest in the property, either as owner or in some other capacity. One has an insurable interest when one is so situated with regard to the property that one will suffer a loss in case of its destruction by the peril insured against. But most fire policies require the insured to have more than a bare insurable interest. See Tyree v. Insurance Co., in Section 730.

727. In general, it may be said that anyone who has a legal or equitable title to property has an insurable interest therein. Thus, bailees, for example, common carriers, innkeepers, and warehousemen, have an insurable interest in property intrusted to their care. But there must be a real interest to protect. For example, a son who expects to inherit his father's property on his death cannot during the

father's lifetime insure the property for his own benefit. If the son takes out such insurance, however, it will protect him in case the son becomes the owner of the property before the occurrence of a loss covered by the policy. See Section 731.

728. If a man enters into a contract of sale whereby he agrees to convey certain lands to another, each party has an insurable interest to protect. Mortgagor and mortgagee, landlord and tenant, all have insurable interests. A partner has an insurable interest in the entire firm stock. If a loss occurs, he must account to the firm on receiving payment from the insurance company.

729. Where a man has a right to occupy certain property during his life, which, upon his death, goes to somebody else, he has an insurable interest in this property.

730. A husband has no insurable interest in his wife's property where the state statutes give to the wife the exclusive use of her property free from the control and debts of her husband. But when he is in possession of his wife's real estate with an inchoate curtesy right, he has been held to have an insurable interest therein. See Section 814.

Tyree *v.* Insurance Co., 55 W. Va. 63 (1904). The Virginia Fire Insurance Company issued a policy to William F. Tyree insuring a house and some furniture. The policy provided that the company should not be liable if the title or interest of the insured was less than the entire, absolute, unconditional, unencumbered fee simple ownership. In fact the property was the separate estate of the wife. The West Virginia statute gives the wife sole control over her separate estate. Under it the husband has no right of possession during marriage and no curtesy initiate. A fire occurred and Tyree sued the Company. *Held* that he could not recover, for he had no insurable interest in the house.

Trade Insurance Co. *v.* Barracliff, 45 N. J. L. 543 (1883). The Trade Insurance Company issued to Barracliff a policy insuring real and personal property. Although the property belonged to his wife, the policy was taken out in Barracliff's name. When a loss

occurred the insurance company defended a suit brought by Barracliff, alleging that he had no insurable interest. *Held*, he could recover. Barracliff had an insurable interest in his wife's property, because he was in actual possession and enjoyment thereof, and also because he had a reasonable expectation of the continuance of these pecuniary advantages as lawful incidents of his wife's ownership and his marital relations with her. In her realty he had, moreover, under New Jersey law, an inchoate curtesy right.

731. In the case of property insurance an interest must exist in the insured at the time of the loss. But it is not necessary that the insured shall have had an interest at the time of the taking out of the policy, unless (as usually happens) its terms require such interest.

(B) Formation of the contract

732. It is not necessary that the contract of insurance be in writing unless this is required by statute or the corporate charter of the insurance company which issues the policy. Whether oral or written the contract must contain all the essential elements of a contract. Oral contracts of insurance are often made in contemplation of a written policy, but in such cases all the essential terms must be clearly understood.

People's Insurance Co. *v.* Paddon, 9 Ill. App. 447 (1881). Paddon called at the office of the insurance company's agent, Miller, and left his policy book with a clerk without giving any directions about his insurance. The book was open at a page on which was written: "$2,500 on Empire not bonded 1,000." Afterwards he met Miller on the street and told him that he had left his policy book at the company's office with instructions about the insurance. A fire occurred and Paddon sued the company. *Held* that he could not recover. To make a valid oral contract of insurance the following things must be agreed upon: (1) the subject matter, (2) the risk insured against, (3) the amount, (4) the duration of the risk, (5) the premium. These matters not being understood, no contract existed.

733. The contract of insurance is one in which the utmost good faith is required of the insured. He must answer truthfully all questions put to him concerning the risk. He must also disclose all material facts the concealment of which would be a violation of good faith. The effect of concealing any material fact is to render the contract voidable at the option of the injured party. See Section 114.

BURRITT *v.* INSURANCE CO., 5 Hill (N. Y.) 188 (1843). Burritt was requested to mention all buildings within ten rods of the building on which he was applying for insurance. He failed to mention a cabinetmaker's shop which materially increased the risk. Although the omission was not fraudulent, the company refused to pay the amount of the loss which occurred later. Burritt sued. *Held,* Burritt's failure to mention the shop was fatal. He had been called upon to speak the whole truth. Had he told of the cabinetmaker's shop, the company would either not have made the contract at all or only made it on different terms.

734. When the insured makes a statement, voluntarily or in answer to an inquiry by the other party, he is obliged to speak the truth. The law requires that there shall be no misrepresentation. Even though made innocently, a misrepresentation will avoid the policy.

ARMOUR *v.* TRANSATLANTIC FIRE INSURANCE CO., 90 N. Y. 450 (1882). The insurance company issued a policy on Armour's warehouse, by the terms of which other insurance was permitted without notice. It was provided that losses should be apportioned on the whole sum insured, and that any misrepresentation whatever should avoid the policy. Armour's agent, Dickinson, who applied for the policy, mistakenly stated that there was already $200,000 insurance upon the building, when there was in fact but $30,000. *Held* that the misrepresentation even though innocently made was material, and Armour could not recover. The insurance company's liability was greatly increased by the fact that there was only a small amount of additional insurance.

735. Where the insured in good faith states his belief or expectation as to a future fact the policy will not be avoided although the event turns out contrary to the insured's belief or expectation.

KIMBALL *v.* ÆTNA INSURANCE CO., 9 Allen (Mass.) 540 (1865). When applying for fire insurance on his house Kimball stated that the house would soon be occupied, that he had a man in view who was going to occupy it. This statement was made in good faith, but before the house was in fact occupied, it was burned by an incendiary. *Held* that Kimball could recover. His promise was made in good faith, and his failure to fulfill it would not avoid the policy in the absence of fraud.

736. A warranty is a representation which is made an essential part of the insurance contract. The effect of a breach of warranty is to make the policy void at the option of the injured party, no matter if the representation concerns an immaterial fact. A warranty as to location is binding, and in order for the insured to recover it must continue to be true during the term of the policy.

LYONS *v.* PROVIDENCE WASHINGTON INSURANCE CO., 14 R. I. 109 (1883). The insurance company issued to Mary Lyons a policy of insurance against fire, on certain articles of furniture, and wearing apparel, "contained in house No.— McMillen Street, Providence, R. I." Lyons, without the knowledge or consent of the insurance company, removed the articles to a house on Power Street, where they were destroyed by fire. The company refused to pay the loss and Lyons sued. *Held* that she could not recover. All material statements in insurance policies, including the location of the insured property, are warranties. They must be true and continue to be true during the life of the policy, or the insured cannot recover thereunder.

EXCEPTION. Goods may be temporarily removed, as, for example, a book from a library, or a wagon from a barn, without invalidating the insurance. The insured may recover if such articles are destroyed when they have been returned after removal, but usually not if they are destroyed while away.

(C) Conduct of the insured after the policy is issued

737. An important provision in most policies is that any change in the interest, title, or possession of the property (other than by the death of the insured), without the company's consent, shall avoid the policy. This clause against alienation is construed as far as reasonable in favor of the insured. Generally, immaterial changes of interest which do not increase the risk are outside the scope of this provision.

Loy *v.* Home Ins. Co., 24 Minn. 315 (1877). The insurance company insured Loy's dwelling house and its contents. The policy provided that it should be void in case of "a sale, transfer, or change in title." Loy mortgaged the premises and they were sold under foreclosure proceedings. After the sale, but before the period for redemption had expired, the loss occurred, Loy being still in possession. *Held* that Loy could recover. Neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession of the property under the proper interpretation of this clause.

738. Most policies provide that they shall be void if the risk is increased by any means within the control or knowledge of the insured, unless notice thereof is given the insurer. The risk may be increased either by a change in the structure or use of the property, or by the introduction of some practice which adds to the chance of loss.

Western Assurance Co. *v.* McPike, 62 Miss. 740 (1885). The company insured the dwelling of McPike against fire. McPike moved out and without his knowledge or consent the premises were used as a retail liquor store. The company refused to pay a loss, contending that the use of the building as a saloon constituted an increase of the risk. *Held* that McPike could not recover. The manner in which the premises were used caused an increase of the risk.

PLANTERS' INSURANCE COMPANY *v.* SORRELLS, 1 Baxter (Tenn.) 352 (1872). The insurance company insured R. P. Sorrells against loss by fire on a dwelling house. It refused to pay a loss on the ground of an increase of the risk by the use of the dwelling by W. H. Sorrells, a brother of the insured, as a boarding house. *Held* that the company was liable. The use of the premises as a boarding house did not constitute an increase of the risk.

739. Another provision is that against additional insurance. This applies to other insurance upon the same interest, so that parties whose interests are not identical, for instance, mortgagor and mortgagee, may insure without violating such provision. If there is no provision against other insurance, and other insurance is taken out on the same risk, the respective insurance companies are liable proportionately, all the policies being considered as one policy. Generally, taking out other insurance on the same interest, without the company's consent and in violation of a prohibitive clause, makes the policy void.

FUNKE *v.* MINNESOTA FARMER'S MUTUAL FIRE INSURANCE CO. 29 Minn. 347 (1882). The Minnesota Insurance Company insured the dwelling house and furniture of Funke against loss by fire for a period of seven years. The policy provided that it should be void in case the insured procured any insurance from any other company on the property insured without first obtaining the consent of the secretary of the Minnesota Company. Funke thereafter obtained insurance on the same property from another company. This last insurance, however, by reason of Funke's misrepresentations, was void. After a loss occurred Funke sued the Minnesota Company. *Held*, he could not recover. By making a subsequent agreement for the purpose of securing further fire insurance, without the Minnesota Company's consent, he avoided the policy even though he could not enforce the second insurance agreement.

740. The ordinary fire policy provides that it shall be void if a building therein described shall remain unoccu-

pied or vacant for ten days. When the insured expects to close his dwelling for a time, as, for instance, when he is going to leave it unoccupied during the summer, he should get the company to consent to this by pasting a "rider" upon the policy agreeing to a temporary unoccupancy.

Continental Insurance Co. of New York *v.* Kyle, 124 Ind. 132 (1890). The insurance company issued a policy to Kyle insuring his dwelling house and its contents against loss by fire. The policy provided that it should be void if the house became "vacant or unoccupied." Kyle's tenant moved out and Kyle rented the house to others. Before the new tenants moved in, but after they had made some slight repairs, the building burned down. The insurance company defended on the ground that the house was vacant and unoccupied. *Held* that there could be no recovery. Even though a certain supervision was exercised over the house, and though it might be said that possession in a certain sense had been taken by the new tenants, the house was vacant within the meaning of the policy, and the insurance was void.

741. The power to make conditions cannot be any greater than the power to disregard them. Therefore, the insurance company may waive a breach of any of the conditions of the policy. A waiver may be made by a duly authorized agent. Generally, however, the policy provides that "agents are not authorized to make, alter, or discharge contracts," so that the insured can be safe only in relying on the waiver of a general agent, and sometimes not even then.

Walsh *v.* Hartford Fire Insurance Co., 73 N. Y. 5 (1878). A policy of insurance issued by the insurance company to Walsh provided that a waiver of any condition of the policy should be valid only when indorsed on the policy by an agent duly authorized to make such waiver. Walsh asked Crawford, the company's general agent, to waive the clause providing that the policy should be void in case the premises were vacant or unoccupied for more than fifteen days. Crawford agreed to do this, but neglected to

indorse his consent to the vacancy on the policy, although he made a memorandum thereof in his insurance register. A fire occurred and Walsh sued the insurance company. *Held* that he could not recover. The mode of waiving the conditions of the policy was specified and Crawford's waiver was effective only when indorsed on the policy. Walsh was presumed to know of the limitation of Crawford's authority, and the latter's verbal waiver did not bind the company.

(D) What risks are insured against?

742. Most insurance policies provide that the insurance company "does insure . . . against all *direct* loss or damage by fire, except as herein provided." Under this clause it is held that a fire must be the proximate cause of the loss or damage. Where a building was damaged principally by the force of an explosion of gunpowder, it was held to be proximately due to a fire which caused the ignition of the gunpowder and the burning of the powder itself, so that the insured was entitled to recover under the terms of his policy. So also where an insured building was damaged by the fall of an adjacent building which was on fire, although no part of the insured building was burned, the damage suffered was held to be proximately due to fire.

743. Where a man removes goods from a burning building and puts them in an adjoining building, and the goods are lost or stolen by reason of the removal, the owner is entitled to recover under a fire policy if he had reasonable ground for thinking that the removal was necessary to save the goods from destruction.

744. A fire policy also protects the insured against fire losses arising from mere ordinary negligence or carelessness. But if a fire results from the insured's gross or reckless negligence or from his fraudulent or willful misconduct or violation of law, the insured is not entitled to recover under the terms of his policy, as, for example,

where a fire resulted from a ship captain's use of turpentine as fuel, in willful violation of the law, while racing his boat.

(E) The transfer of the policy

745. A fire insurance policy may be transferred with the consent of the company. Ordinarily, where insured property is conveyed and nothing is said about the insurance, the purchaser does not acquire title to the insurance policy, and the insurance comes to an end. If after the transfer the property burns down, the seller cannot recover on his policy of insurance because he no longer has any interest in the property. The purchaser cannot recover because he never made a contract of insurance with the company. In purchasing real estate, therefore, it is often wise for the purchaser to contract for a transfer of the insurance policy at the time of the delivery of the deed.

746. A fire insurance policy may not be transferred without the company's consent before a loss occurs, because in making a contract of insurance the company is supposed to regard the personal character of the insured, and, while it may be willing to insure A, it does not follow that it would be willing to insure B. See Section 167. The sale of the insured property without the company's consent generally avoids the policy. But if the company assents to the seller's assignment of the policy to the purchaser, this constitutes a new and original contract between the company and the purchaser.

747. While the insurance policy may not be transferred without the company's consent before a loss has occurred, after the property has been destroyed or damaged by fire, the liability of the company is fixed, and the owner of the policy may, therefore, transfer it without the consent of the company.

(F) Notice and proof of loss

748. Most fire policies provide that the insured shall give the company "immediate notice" in writing of the occurrence of a fire, and furnish the company within sixty days "satisfactory" proof of loss.

749. The requirement as to immediate notice of the happening of a fire is construed to mean that the insured must be reasonably diligent in notifying the company thereof as soon as possible under the circumstances. The same construction is given to requirements that notice shall be given "forthwith" or "as soon as possible."

750. The general rule is that a failure to furnish proofs of loss within the required period does not operate as a forfeiture of the insured's rights under the policy, unless it is expressly provided that such failure shall render the policy void or that no action shall be maintained on the policy unless all its conditions have been complied with.

751. The company may waive notice and proof of loss. If it does this either expressly or impliedly, and gives the insured good reason to believe that it does not intend to insist upon such notice and proof, he is not bound to give them.

752. Where the insured in good faith furnishes proof of loss, which he believes to be sufficient, but which in fact contains some defects, it is the company's duty to make objection promptly if it intends to rely on such defects. Failure to object will justify the insured in supposing that he has filled the requirement.

Bumstead *v.* Dividend Mutual Insurance Co., 12 N. Y. 81 (1854). Bumstead was insured in the Dividend Mutual Insurance Company. The policy provided that in case of loss the insured should deliver to the company a sworn statement thereof, verified, if required, by books of account and other proper vouchers. The insured's property, account books, and vouchers were all destroyed, and Bumstead made an honest general statement of his

loss with the best additional evidence he could give. The company defended on the ground that he had not furnished proofs of loss in the manner required by the policy. *Held* that he could recover. The acceptance of the proofs furnished by Bumstead without objection involved a waiver of any technical defects.

QUESTIONS

1. Define fire insurance.

2. What is meant by an insurable interest?

3. State examples of various relations that give rise to insurable interests.

4. A owns a house and lot which is mortgaged to B for $3,000. A agrees to sell the property to C for $5,000. Which of these three parties has an insurable interest in the property?

5. At what time must the insured have an insurable interest?

6. Need the contract of insurance be in writing?

7. State the five elements of valid oral insurance contracts.

8. The Aldine Insurance Co. issued a fire insurance policy covering the stock and fixtures of Vincent Baer in the amount of $5,000. The Aldine Insurance Co. then reinsured $2,500 of this amount in the Munich Insurance Co. The Aldine Co. knew that Baer had a bad reputation as a firebug, but neglected to state this fact to the Munich Co. Baer's stock and fixtures are burned, and the Aldine Co. pays him $5,000. Is the Aldine Co. entitled to recover $2,500 from the Munich Co.?

9. What is the duty of the insured with regard to disclosures? What is the effect of the concealment of any material fact?

10. What is the effect of misrepresentation?

11. Richardson applied for fire insurance in the Lincoln Mutual Insurance Co. In his application he stated that an open fireplace in the dwelling house to be insured would not be used. Without the knowledge and consent of Richardson a fire was built in the fireplace and as a result thereof the house was destroyed by fire. Is Richardson entitled to recover on his policy?

12. Define warranty. What is the effect of a breach of warranty?

13. Anderson insured his dwelling house in the Hibernia Insurance Co. Will the insurance policy be terminated if Anderson mortgages his house to Dickson without the company's consent

Will the insurance policy be terminated if Anderson sells his house to Lippincott without the company's consent?

14. Parker had a policy in the Union Fire Insurance Co., insuring his house and its contents against fire. He kept a small quantity of gasoline on the premises which he used for cleansing purposes. In a suit on the policy the company defended on the ground that the use of gasoline constituted an increase of the risk. Which wins?

15. What is the effect of taking out other insurance on the same interest without the company's consent? May different interests in the same property be insured?

16. What is the effect of leaving an insured property vacant or unoccupied for a longer period than ten days?

17. Coates had a policy in the Standard Insurance Co., covering his stock in trade and fixtures. The policy provided that a waiver of any condition should be made only through an authorized agent by means of an indorsement on the policy. Coates asked Wright, the company's agent, to waive one of the conditions of the policy and to indorse his waiver thereon. Wright said that it would not be necessary to indorse his waiver on the policy, and did not do so. In a suit on the policy the company defended on the ground of a breach of this same condition of the policy. Which wins?

18. Is damage done to an insured building by water, due to the efforts of firemen to extinguish a fire in an adjacent building, a risk covered by the policy?

19. Scott's household furniture was insured in the Beneficial Insurance Co. The house of Scott's neighbor, Kern, took fire and Scott, fearing that the flames might spread to his house, removed all his furniture and placed it in the lane. Some valuable furniture was stolen. Is Scott entitled to recover from the insurance company the value of the things thus stolen?

20. May a policy of fire insurance be transferred without the company's consent after the occurrence of a fire? What is the reason for prohibiting transfers of the fire insurance without the company's consent before a fire has occurred?

21. What is the requirement of the usual form of fire policy regarding notice of the loss and proofs of loss? How are these provisions of the policy interpreted?

CHAPTER LVI

LIFE INSURANCE

753. Life insurance is a contract whereby one party, called the insurer, promises to pay a certain named sum to a second party upon the happening of a certain death or at a designated time, in consideration of definite payments, called premiums, made regularly to the insurer. The sum may be payable to the one whose life is insured, to his executor or administrator, to a person designated by him, or to certain others having an insurable interest. The person to whom the insurance money is payable is called the beneficiary.

(A) Who has an insurable interest?

754. The requirement of insurable interest is based upon that principle of public policy which prohibits wagers. Obviously it would be unwise to permit a man to insure another's life when thereby he would be more interested in having that life brought to an end than in having it continued. Therefore, the law generally ordains that when one insures another's life he must be so situated, either by relationship or business dealings, toward the person whose life is insured that he will have an interest to preserve the life in spite of the insurance. But in New Jersey it appears that an insurable interest is not required in life insurance. Contrary to the rule in property insurance, the interest must in life insurance exist at the time the policy is taken out. The fact that the interest afterwards ceases to exist does not invalidate the life insurance.

755. Where a man insures his own life and pays the premiums, he may name as beneficiary one who has no insurable interest in his life. Where the premiums are paid by the beneficiary, however, he must have an insurable interest. A man has an insurable interest in his own life to any amount he chooses to pay premiums on. Certain relationships by blood or marriage, and certain commercial transactions give people insurable interests in the lives of others.

756. Ordinarily, no matter how closely two people are related, neither has an insurable interest in the other's life by mere virtue of relationship alone. There must be an expectation of pecuniary benefit. For example, a parent has an insurable interest in the life of his child on the ground that he is entitled to the child's earnings during minority, and that on reaching full age the child is liable to be called on to contribute to his, the parent's, support. A sister has an insurable interest in the life of a brother who supports her.

757. Husband and wife have an insurable interest in each other's life. Each has a pecuniary interest in the other; the wife is entitled to support, and the husband is entitled to his wife's services. A woman has an insurable interest in the life of her betrothed.

Chisholm *v.* National Capitol Life Insurance Co., 52 Mo. 213 (1873). Harriet Chisholm was engaged to marry Robert Clark. She took out a policy of insurance on his life payable to her as his intended wife. When Clark died the company refused to pay on the ground that Chisholm had no insurable interest in Clark's life. She then sued on the policy. *Held* that Chisholm could recover. She had an insurable interest in Clark's life, a valid contract of marriage existing between them. Had he lived and violated the contract she could have sued him for damages for breach of promise. Had the engagement to marry been performed, then as his wife she would have been entitled to support.

758. When a person acquires a commercial interest in the life of another, he may protect that interest by insurance. A creditor may insure his debtor's life, a partner his co-partner's, or a surety the life of his principal. But a creditor in insuring the life of his debtor must take care that the transaction does not become a mere wagering contract. In order to prevent speculation on the debtor's life a creditor will not be allowed to recover on a policy on a debtor's life in an amount wholly disproportionate to the amount of the debt. He may take out a policy for an amount which will give him reasonable protection under the circumstances, but the amount of the policy must not be so greatly in excess of the debt that it is clear he is wagering upon his debtor's life.

CAMMACK *v.* LEWIS, 15 Wall. (U. S.) 643 (1873). John E. Lewis owed $70 to Cammack, which he was not able to pay. At Cammack's suggestion Lewis insured his life in the New Jersey Mutual Life Insurance Company for $3,000, Cammack paying the first premium and agreeing to pay the others. Lewis then assigned the policy to Cammack. Lewis died seven months afterwards and Cammack collected $3,000 from the company. Lewis's administratrix, Maggie Lewis, then sued Cammack to recover this insurance money. *Held* that she was entitled to receive from Lewis the $3,000 less the amount of his debt and the premium paid. As far as Cammack was concerned, insurance of $3,000 to secure a debt of $70 was a mere wager. The disproportion between Cammack's real interest and the amount to be received by him deprived it of all pretense to be an honest effort to secure the payment of his debt.

(B) Formation of the contract

759. Much of what was said about the formation of a contract and the construction of the policy in property insurance is generally applicable to life insurance. It is doubtful in some states whether or not private individuals have the right to issue policies of life insurance, and as a

practical matter the insurance departments of the various states will seldom license individuals to do so.

760. Generally, it may be said that the concealment of any material fact will avoid a policy of life insurance. A fact is material if knowledge of it would influence the parties in making the contract. It is not necessary that it shall increase the risk or contribute to the loss. The insurer ought to scrutinize very carefully the answers in the application. If the applicant neglects to answer a question or answers it imperfectly the issue of a policy by the insurer will be held to be a waiver of such neglect or imperfection. See Section 733.

PHŒNIX INSURANCE CO. *v.* RADDIN, 120 U. S. 183 (1886). Sewell Raddin applied for insurance on the life of his son, Charles E. Raddin. In answer to a question containing four interrogatories as follows: "Has any other application been made for assurance? If so, with what results? What amounts are now assured on the life of the party? And in what companies?" Raddin replied, "$10,000 Equitable Life Assurance Co." In an action on the policy the company defended on the ground of the intentional concealment by Sewell Raddin of the fact that within three weeks before the issue of the policy he had applied to two other companies for additional insurance on his son's life each of which had declined to take the risk. *Held* that the answers were not warranties but representations which were required to be substantially true. However, as this question appeared to be imperfectly answered the issue of the policy without further inquiry was a waiver of the imperfections of the answer and rendered the omission to answer more fully immaterial. Raddin was, therefore, allowed to recover.

761. All statements in life insurance policies are regarded as being made at the time of the delivery of the policy to the insured. If, therefore, between the time of signing his application and the delivery of the policy any change takes place in the insured's condition he should disclose this fact to the insurance company. A change in the

insured's condition, whether made known to the company or not, may have the effect of invalidating the insurance.

CABLE *v.* U. S. LIFE INSURANCE Co., 111 Fed. 19 (1901). Cable applied to the insurance company for a life insurance policy. In his application he warranted that he had never had pneumonia and further agreed that the policy should take effect only upon "payment of the first premium and delivery of the policy during his lifetime, sound health and insurable condition." When the policy was ready and tendered to Cable he refused to accept it on the ground that he wanted to consult with his friend George S. Lord. Shortly afterwards Cable was taken ill with acute pneumonia. Three days later the company's solicitor tendered the policy to Lord as Cable's agent who accepted the same and paid the first premium. The solicitor asked Lord how Cable was and Lord said, "No worse than he had been for the past forty-eight hours." The company had no knowledge of Cable's illness until after his death five days later. The company refused to pay the amount of the policy and Cable's administratrix sued. *Held* that she could not recover. It was the duty of Lord as Cable's agent fully to disclose his condition. His partial statement was misleading and not such as to put the agent on inquiry. The delivery of the policy under such circumstances did not create a contract of insurance even though Lord was not guilty of intentional fraud.

762. Failure to pay the first premium in the case of life insurance generally prevents the policy from taking effect, while the failure to pay subsequent premiums gives the company the right to declare a forfeiture of the policy. The person paying the premiums on a life insurance policy should, therefore, be careful to pay before the last day for payment expires.

(C) Beneficiaries

763. Where a person insures his life and designates another as beneficiary, he has ordinarily no right to change the beneficiary so as to make the policy payable to somebody else without the original beneficiary's consent, unless

he has expressly reserved that right. But if the person whose life is insured avoids the policy in any way, the beneficiary may not recover from the company.

764. The beneficiary has a vested interest in the policy, except in Wisconsin, and even though he should die before the person whose life is insured, the proceeds of the policy will pass to the beneficiary's estate rather than to the estate of the one whose life is insured. But the latter may, as a rule, when taking out the insurance, reserve the right to change the beneficiary. If he fails to change the beneficiary, however, and thereafter dies, the beneficiary or his estate is entitled to the insurance money.

CENTRAL BANK OF WASHINGTON *v.* HUME, 128 U. S. 195 (1888). Thomas L. Hume, while insolvent, insured his life, naming his wife and his children as beneficiaries. When Hume died, he was heavily indebted to the Central Bank. His widow collected the insurance and the bank sued her to have the insurance money applied to the payment of Hume's debt. *Held* that the wife and children took a vested interest in the proceeds of the policy, of which Thomas L. Hume could not deprive them. Neither have the personal representatives or the creditors of the insured any interest in the proceeds of such policies, which belong exclusively to the beneficiaries to whom they are payable.

765. The rights of the beneficiary in any case, however, will depend upon the terms of the policy. He may get a vested interest in the policy as above set forth, or the policy may provide that his interest therein shall be defeated by the happening of some event, as, for instance, his death during the lifetime of the insured.

(D) Suicide; execution for crime

766. Generally, the policy provides that it does not cover death by the hands of the insured or by the hands of justice, or in violation of the law. In the absence of

such provision the policy will usually not be avoided in case the insured commits suicide, if the policy is payable to a designated beneficiary, and not to the estate of the insured. The reason of this rule is that suicide is regarded as one of the risks assumed by the insurer. But in the United States courts and the New York courts the rule does not obtain, and suicide avoids the policy.

Patterson *v.* Natural Premium Mutual Life Insurance Co., 100 Wis. 118 (1898). Patterson insured his life, naming his children as beneficiaries. Four months later he committed suicide. The company defended on the ground that suicide, while Patterson remained sane, was not a risk covered by the policy. *Held* that the beneficiaries could recover. Since third persons were the beneficiaries, Patterson's intentional self-destruction while sane did not avoid the policy in the absence of any provision therein to that effect.

767. Even though the policy fails to provide that the insurer shall not be liable in case of the death of the party whose life is insured at the hands of the Government, the beneficiary cannot ordinarily enforce payment if the death occurs by reason of execution for crime.

(E) Notice and proof of death

768. Life insurance policies generally require immediate notice to the company of the death, and the furnishing of satisfactory proof thereof. See Sections 749 to 752.

QUESTIONS

1. Define life insurance. Insurer. Beneficiary.

2. What is an insurable interest? When must an insurable interest exist? What is the reason for requiring an insurable interest?

3. State examples of various relationships which give rise to an insurable interest. Have husband and wife an insurable interest in

each other's life? What is the rule with regard to insurance taken out by a creditor on the life of his debtor?

4. Mallory applied for a policy of insurance in the Prudence Life Insurance Co. One of the questions in the application was: "Has the applicant ever had any disease of the lungs?", to which Mallory replied "No." In fact Mallory had had a severe attack of pneumonia six months previously. Could the company successfully defend a suit on the policy on the ground of Mallory's neglect to disclose this fact?

5. What is the effect of failure to pay the first premium?

6. May a person whose life is insured change the beneficiary without the latter's consent?

7. What are the rules with regard to suicide? Execution for crime?

BOOK FIFTH

THE ESTATES OF DECEDENTS

THE MANAGEMENT OF DECEDENTS' ESTATES

CHAPTER LVII

THE GRANTING OF AUTHORITY TO ADMINISTRATORS AND EXECUTORS, AND THE REVOCATION THEREOF

769. In this book we shall consider the duties of those who take charge of the estates of decedents from the time they qualify until they file their final accounts. An executor is a person appointed by the testator to take charge of his estate. An administrator is a person appointed by public authority to take charge of the estate of a decedent who did not appoint an executor, or whose executor has not wound up the estate.

770. The executor is appointed by will. But he does not derive his authority entirely therefrom. To establish his authority complete, it is usually required that the one appointed shall signify his acceptance of the appointment by proving the will, taking oath to perform his duties as executor, and receiving letters testamentary from the public official who has charge of such matters. The letters testamentary constitute a certificate of the executor's authority.

(A) Proving the will

771. The duty of proving the will rests upon the person who is thereby appointed to take charge of the decedent's estate. The executor should, therefore, duly offer the will

for probate in the probate court. Where the executor has custody of the will, but does not desire to qualify as executor, he should formally renounce the office of executor, and file the will safely in the proper office. When the executor renounces or does not qualify, the probate court may appoint an administrator with the will annexed. If the executor fails to prove the will, any person having a valid interest therein may offer it for probate.

772. To get a will admitted to probate it must be formally proved in the probate court. This task is begun by filing a petition for probate. If the executor makes the petition, he usually sets forth that he is the executor named in the will, the place and date of death of the deceased, together with his last domicile, the estimated value of the property, and names and residences of any surviving spouse and next of kin. He also states that the instrument offered is the decedent's last will and testament, and asks to be confirmed as executor. The will may usually be admitted to probate without further procedure other than proof by the oaths of one or more of the witnesses of the fact that the testator signed the will. In many states, however, when the executor offers the will for probate, notice must be given to interested parties either personally or by advertisement. If it appears that the parties interested do not object, probate will usually be granted upon the testimony of one or more witnesses.

(B) Qualifications of executors and administrators

773. The next question to be treated concerns the appointment of executors and administrators. In the case of a will it is plain enough that the naming of the executor is done by the decedent who has made the will. If the decedent has died without a will, the widow or widower is first entitled to receive a certificate of authority to manage and

settle the decedent's estate, called letters of administration. If there is no surviving spouse, the persons next entitled are the next of kin, who under the statute of distribution of the particular state would receive the residue of the personal property, or a share thereof, after payment of debts. In general, it may be said that the order of preference is as follows: first, widow or widower of the decedent; second, children; third, grandchildren and other lineal descendants; fourth, father or mother; fifth, brothers and sisters; sixth, descendants of deceased brothers and sisters; seventh, grandfather or grandmother; eighth, uncles or aunts; ninth, cousins; tenth, creditors or other proper persons.

774. Valid reasons may justify a departure from this order in certain cases. For example, one who occupies a hostile position toward the estate should not be appointed. Neither should minors, drunkards, weak-minded or insolvent persons be appointed. When persons are in the same degree of relationship to the decedent, males are generally preferred to females. The older one of two applicants is often chosen when there is no better way to decide between them.

(C) Various kinds of executors and administrators

775. If the decedent's will does not name an executor, or the person named is unable or unwilling to act, an administrator *cum testamento annexo* (with the will annexed) is appointed. Such an administrator is generally called an administrator c. t. a. The administrator c. t. a. differs from an ordinary administrator in that his duties are sometimes marked out by the terms of the will, while an ordinary administrator has no will to guide him.

776. If an estate has been partially wound up by an executor or administrator, who dies or is removed before he has fulfilled all his duties, it becomes necessary to ap-

point a successor. This successor is called an administrator *de bonis non*, whose duty it is to manage and wind up the affairs of the estate not already settled by the first administrator. If a decedent has left a will, and his executor or administrator has died or been removed before the estate is wound up, the successor is called an administrator *de bonis non cum testamento annexo*. The duty of this administrator is to finish the work left uncompleted by his predecessor, pursuant to the terms of the will.

777. An administrator *pendente lite* is an administrator who is appointed to take charge of the affairs of an estate pending the settlement of a dispute concerning the estate which has arisen among the interested parties. An administrator of this kind proceeds with the settlement of the estate, and as soon as it is learned which of the disputants is in the right, a regular administrator is appointed and the administrator *pendente lite* turns over the estate in his hands to his successor.

778. In several of the states an officer designated as the "public administrator" is appointed by law to administer the estates of decedents in certain cases. He may be entitled to act in estates where the decedent has left no relatives, or where the relatives refuse to act, and in certain other proper cases. His duties are in general similar to those of an ordinary administrator.

779. An executor *de son tort* is a person who wrongfully intermeddles with the estate of a decedent and presumptuously takes it upon himself to manage its affairs. Since he has assumed to be an executor, he is liable to the rightful executor or administrator for whatever property belonging to the estate comes into his hands. While he is not entitled to compensation for his services, he may claim credit for the legal debts of the decedent paid by him.

(D) Bonds of executors and administrators

780. Administrators in almost all cases are required to file bonds for the faithful performance of the duties of their office. In most of the states executors are also required to file bonds for the faithful fulfillment of their duties unless the filing of such bonds is expressly dispensed with under the terms of the will.

(E) Revocation of the authority of executors and administrators

781. The ordinary rules applicable to any fiduciary apply in the case of executors and administrators. For any breach of the duties of their trust they may be removed by the power which appointed them. An application for their removal may be made by any person having an interest in the estate. The authority of an executor or administrator is subject to revocation for any act of gross neglect or wilful misconduct such as the use of his position to obtain an unlawful personal profit.

QUESTIONS

1. Distinguish between the offices of executor and administrator.

2. What steps are necessary to make the executor's authority complete?

3. Enumerate the facts which should be set forth in a petition for probate.

4. Enumerate the persons who may be entitled to letters of administration on the estate of a decedent where there is no competent executor.

5. What persons should not be appointed administrator?

6. Define (*a*) administrator *cum testamento annexo*, (*b*) administrator *de bonis non*, (*c*) administrator *de bonis non cum testa-*

mento annexo; (*d*) administrator *pendente lite*; (*e*) executor *de son tort*, (*f*) public administrator.

7. What security is required of executors and administrators for the faithful performance of their duties?

8. When may executors and administrators be removed? By whom? On whose application?

CHAPTER LVIII

THE DUTIES OF EXECUTORS AND ADMINISTRATORS AFTER THEY HAVE QUALIFIED

782. Executors and administrators have generally much the same duties, except that administrators are not ordinarily required to prove a will. *Hereafter when mention is made of an executor it must be understood that the remarks apply to an administrator also.* In general the duties of an executor are as follows: (1) to bury the decedent; (2) to give public notice of his appointment; (3) to file an inventory and appraisal; (4) to collect what belongs to the estate; (5) to pay the decedent's debts and the costs of administering the estate; (6) to pay the succession taxes and other taxes in proper cases; (7) to file an account; (8) to have his account settled; (9) to distribute the balance in his hands among the persons entitled. We shall briefly discuss each of these duties.

(A) The first step: to bury the decedent

783. The first duty of the executor is to see that the decedent's body is disposed of in accordance with the wishes expressed by the decedent. If the decedent has not made known his wishes as to the mode of burial, the executor should see that his remains are buried in a manner suitable to his circumstances and station. It often happens, however, that the decedent is buried before the executor qualifies, and even before the contents of the will are known.

(B) The second step: to give public notice of one's appointment

784. After the executor has been appointed, and has fully qualified, public notice of his appointment must be given, by advertisement or otherwise. The purpose of this requirement is to expedite the settlement of the estate by promptly informing creditors and other interested parties as to such appointment.

(C) The third step: to file an inventory and appraisal

785. The statutes of all the states require that the executor make and file, or cause to be made and filed, within a fixed time, an inventory and appraisal of the goods, chattels, and credits of the deceased. If this is filed, and the executor or administrator learns subsequently of other assets belonging to the estate, he should make and file an inventory and appraisal of them also. But in some states he is required only to account for after-discovered assets, without being obliged to file an inventory and appraisal of them.

786. The inventory and appraisal should include all bonds, notes, and other evidences of debt due to the decedent, as well as all other claims and demands for money, and all kinds of personal property owned by the decedent at the time of his death. If the executor himself owes the decedent any money he should include his own debt in the list.

(D) The fourth step: to collect what belongs to the estate

787. The executor should gather in all the personal property belonging to the estate. This includes moneys due on life insurance policies which are made out in favor of the decedent or his estate. If the policy is payable to the decedent's widow or children the executor has no right

to the proceeds, for such policies belong to the beneficiaries. See Section 764.

788. If the decedent has been in business for himself, the executor should, as a rule, close the business out as soon as possible. A delay in doing this, however, may be justified if the executor finds it necessary to run the business for a while in order to avoid the heavy loss sometimes incident to a sudden closing out. The executor of a deceased partner has nothing to do with partnership effects. The right to liquidate the firm's affairs belongs to the surviving partner. See Sections 395 and 396.

789. An executor generally has nothing to do with real estate unless special authority is conferred by the will. In the absence of such authority he should not collect rents accruing after the decedent's death. He should, however, collect arrears of rent which have fallen due in the decedent's lifetime. If the decedent in his lifetime has made a contract to sell certain real estate, but the deed has not been executed, it is considered that the decedent has converted the real estate into personalty, and, if the contract is afterwards carried out, the executor will be entitled to the proceeds of the real estate.

790. Usually an executor should not undertake to invest the funds coming into his hands. His duty is to wind up the estate. When he converts property into cash he should promptly deposit the cash to the credit of the estate with some responsible banking institution. Sometimes, however, where the estate will remain unsettled for years, he may invest money in his hands, in order to make it more productive.

(E) The fifth step: to pay the costs of administering the estate and the decedent's debts

791. It is the duty of the executor to pay the decedent's debts. Whenever possible, he should pay debts promptly

in order that interest may not be charged, but if the estate is insolvent he must beware of paying any creditor more than his proper share. In many states certain debts are entitled to priority in payment. Generally, the order of preference is about as follows: (1) funeral expenses and costs of administration; (2) expenses of last illness; (3) judgment debts in some states; (4) servants' wages not exceeding one year in Alabama, Arkansas, California, Delaware, Illinois, Indiana, Kansas, Maryland, Massachusetts, Missouri, Montana, North Carolina, Ohio, Oregon, and Pennsylvania; (5) in Georgia, Maryland, New York, Pennsylvania, and South Carolina claims for rent not exceeding one year.

792. Where the personal property is insufficient to pay all the debts it is necessary to sell real estate to make up the deficit. Usually the real estate goes directly to the relatives in case there is no will, and to the persons to whom it is left in case there is a will. The testator may give his executor an express power to sell real estate to pay debts in case the personal estate is insufficient for that purpose.

793. In all the states statutes confer upon the court which has supervision of decedents' estates power to order the sale of the real estate of a decedent for purposes of administration, such as the payment of debts. The statutes designate the person who may apply for such an order. Generally the right is conferred upon the executor or administrator and creditors of the decedent. The time within which an application must be made is usually fixed by law. If no time is so fixed, the application must be made within a reasonable time.

(F) The sixth step: to pay the succession taxes and other taxes in proper cases

794. Often an executor must pay taxes for which the decedent was personally liable at the time of his death. Such taxes may be considered as debts due by the decedent. Executors are mostly concerned with the payment of succession or inheritance taxes. While these taxes are really payable by the beneficiaries, it is usually the executor's duty to see that they are paid.

795. Succession or collateral inheritance taxes are those imposed by government upon the privilege of taking and enjoying the property of a decedent. They are payable with certain exceptions by all beneficiaries to whom any interest in the estate of a decedent is transmitted. See Section 811. The rate of taxation varies in different jurisdictions from one to ten per cent or even more. Usually these taxes are only imposed on estates where the net amount passing to beneficiaries exceeds a certain minimum, which varies in the different states, for the most part ranging from $250 to $1,000.

796. In general, succession taxes are imposed on every interest passing to an heir or other beneficiary, although certain classes of persons are usually exempted by the express terms of the statutes from the payment of these taxes. Ordinarily, the parents, widow or widower, children and other descendants of the decedent born in lawful wedlock are exempted from the payment of succession taxes. In some states charitable, educational, and religious institutions are also exempted.

797. A legacy given and accepted in full satisfaction of a debt is not usually taxable, except in New York. But where there was no legal obligation upon the decedent to pay and the legacy is given as a gratuity for services rendered without expectation of reward, it will be subject to the tax.

797*a*. The inheritance of real estate is usually subject to a tax imposed by the state where the real estate is situated. Likewise, the inheritance of tangible personal property, such as furniture, is usually subject to a tax imposed by the state where the tangible personal property is located. The succession to a decedent's other personal property, such as accounts receivable, is usually subject to a tax imposed by the state where the decedent has been domiciled.

797*b*. Moreover, a United States tax, called the Federal Estate Tax, is payable on an estate whose net value, after deductions for certain gifts to charity, religion, education, etc., and for debts and expenses of administration, exceeds $100,000.

797*c*. An executor should be prompt in giving the notices and making the payments required by the tax laws. Otherwise, he may incur heavy penalties.

QUESTIONS

1. Enumerate the duties of executors and administrators.
2. What is the executor's duty with regard to the remains of the deceased?
3. What notice should the executor give of his appointment?
4. How should the executor account for assets of the estate coming into his hands? What should be included in the inventory and appraisal?
5. What is the executor's duty with regard to life insurance policies? With regard to the decedent's business?
6. What authority has an executor over the decedent's realty?
7. When may an executor invest funds of the estate?
8. When should the executor pay the decedent's debts? Give the order in which debts should generally be paid. What should the executor do if the personal estate is insufficient to pay debts?
9. What taxes are usually imposed on decedents' estates? Who are generally exempt from the payment of these taxes?
10. In answering the foregoing questions about the duties of executors, to what extent will your answers cover the duties of administrators also?

CHAPTER LIX

THE ACCOUNTS OF EXECUTORS AND ADMINISTRATORS, AND THE FINAL STEPS IN CLOSING AN ESTATE

(A) The seventh step: to file an account

798. It is the duty of the executor to keep an accurate record of all moneys and properties belonging to the estate which come into his hands, and also of all payments and disbursements made on account of the estate. It is generally further incumbent upon him to file in a designated office within a certain time an account of his administration of the estate, showing all receipts and disbursements. If the executor fails without just cause to file his account within the required time, any party in interest, as, for example, a creditor, an heir, or a legatee, may upon application to the probate court obtain an order directing the filing of an account. His failure to file an account after such order may then subject him to revocation of his letters of authority, to fine or imprisonment for contempt of court, or to prosecution by indictment.

1. Debit entries

799. In general the executor must account for all the assets of the estate which have come into his hands as executor. The inventory and the appraisal is usually the basis of his account. He is, therefore, charged with the amount of the appraisal. However, he may show that the property inventoried turned out to be worth more or less than the amount set forth. All this appears in his account of principal.

800. Besides the personal chattels listed in the inventory and appraisal the executor should charge himself with all income received therefrom. These items of income should be stated apart from the account of principal.

801. In the absence of special authorization to deal with real estate, he does not come into possession thereof, and since he does not receive the rents he cannot be called upon to account for them.

802. An executor is a fiduciary. If, therefore, he uses the funds of the estate and earns interest thereon he will be charged in his accounting with the interest earned. If he embarks the funds of the estate in business for his own purposes, the beneficiaries may in some jurisdictions elect to charge him either with legal interest or with the profits made by him. If an executor mingles the estate's moneys with his own he may be charged with interest thereon because it will be presumed that he must have used the moneys. And, if as a result of such intermingling, it is impossible to tell how much belongs to the estate and how much to the executor personally, the estate will be entitled to the whole.

2. Credits and disbursements

803. In general, an executor is entitled to credit for all reasonably necessary expenses incurred by him in the administration and settlement of the estate. In order that credits claimed by the executor may be allowed it should appear that: (1) the expenses were incurred in good faith; (2) they were reasonable in amount; (3) they were not made necessary by the executor's misconduct. The expenses for which credit may be claimed by the executor vary in accordance with the size of the estate and the transactions necessary to settle it. The items for which credits are most commonly claimed will be briefly treated under the following subdivisions: (*a*) expenses of administration,

(*b*) debts of the estate, (*c*) compensation of executors and administrators.

804. (*a*) *Expenses of administration.*—Proper items of credit under this head include the cost of proving the will, if any, and of letters testamentary or letters of administration, fees paid to appraisers, and for advertising, and generally all legitimate expenses involved in managing, preserving, and settling the estate.

805. Under ordinary circumstances executors are not entitled to allowances for sums paid to agents and other servants. This is for the reason that executors are paid for their own services and ought not to expect double compensation when they delegate their duties. However, extraordinary circumstances may justify the employment and remuneration of agents and other clerks. The expediency of such employment is a matter to be determined by the court. The employment of a lawyer to advise the executor is proper, and the estate is liable for a reasonable attorney's fee.

806. (*b*) *Debts of decedents.*—An executor should pay and in his account claim credit for all legal debts due by his decedent. Where any debt arises out of a contract made by the decedent in his lifetime which could be enforced against him if living, it is a legal debt against the decedent's estate and should be paid by the executor. In addition to this any debts properly contracted by the executor in the administration of the estate constitute debts of the decedent's estate which should be paid, and for which credit should be claimed by the executor. Credits may be claimed for the cost of the religious ceremonies in connection with the funeral, the price of a burial lot and a tombstone, provided these are in keeping with the decedent's circumstances. See Section 791.

807. (*c*) *Compensation of executors.*—In all the states except Delaware an executor is entitled to a fair compen-

sation for the value of his services in settling the estate. His claim for compensation is one of the expenses of the administration, and is generally payable even before debts and legacies. There is no fixed rule as to the amount of such compensation. It is determined by the allowance of the court which supervises the executor's accounts, or by a local statute on the subject, or by a recognized local custom fixing the commissions at a certain rate, as, for example, three or five per cent.

(B) The eighth step: to have one's account settled

808. When the executor has finally prepared his account he should present it for filing, recording, and auditing in the probate court. The probate officer who has charge of the settlement of estates may be designated as Judge of the Probate Court, Judge of the Orphans' Court, Register or Registrar of Wills, or Surrogate, but, whatever his title, his duties are generally much the same. After the account has been duly filed and recorded it is audited or approved by the probate officer. If any errors or irregularities appear in it, they should be pointed out and corrected.

(C) The ninth step: to distribute the balance in one's hands among the persons entitled thereto

809. If no errors or irregularities appear, the account is approved in accordance with the statute of the state wherein it is filed, and the executor is ordered to distribute the balance remaining in his hands among the parties entitled. He then has a right to be discharged from the office of executor.

QUESTIONS

1. What is the executor's duty with regard to filing an account? Who may compel the filing of an account? How should the inventory and appraisal appear in the account?

2. Discuss the rules applicable to the use by the executor of funds belonging to the estate in his personal transactions.

3. What three essentials must be present in order that credits claimed by an executor may be allowed? What are the three main classes of expenses for which credits are most commonly claimed?

4. What are proper items of credit under expenses of administration? Is an executor entitled to allowance for sums paid to employees? May the executor employ an attorney and charge his fee to the estate?

5. What debts of the decedent should the executor pay and claim credit for?

6. What is the rule with regard to the compensation of executors?

7. Where should the account be filed? What is the procedure governing the auditing of an executor's accounts?

8. When is the executor entitled to be discharged from his office?

9. To what extent will your answers to the foregoing questions about executors apply also to administrators?

THE INTESTATE LAW, WILLS AND TRUST ESTATES

CHAPTER LX

THE INTESTATE LAW

810. Sometimes a will is called a testament, and the man making it is called a testator. If he leaves no will he is said to die intestate. The intestate laws of the state in which his realty is situated govern the distribution of his real estate. The intestate laws of the state in which he was domiciled govern the distribution of his personalty. What is here said with reference to the descent and distribution of property in cases of intestacy must be understood as being qualified by various state statutes concerning partnerships, homesteads, and widows' and children's exemptions, as well as subject to creditors' rights.

811. The laws with regard to the devolution of property in case of intestacy differ in the various states. In general, it may be said that the order of succession, subject to the rights of the surviving husband or wife, is as follows: (1) to the intestate's children and other descendants; (2) in default of lineal descendants, to the parents of the intestate; (3) to the intestate's brothers and sisters; (4) to other remoter relatives of the intestate.

(A) The rights of the widow

812. Formerly when a man died intestate the widow was entitled to one third of his real property for life and one third of his personalty absolutely if he left issue, and to one third of his realty for life and one half his personalty absolutely if he left no issue. The laws of the different states have varied these rules in certain particulars.

813. When the husband dies leaving issue the widow is now usually entitled to all or part of her deceased husband's personal estate absolutely and to part of his real estate for life or absolutely. When the husband dies leaving no issue, the widow is ordinarily entitled to one half the personal estate absolutely and one half the real estate absolutely or for life. Where the husband leaves neither issue nor other relatives, the widow often gets the entire estate, both real and personal.

(B) The rights of the widower

814. Formerly a surviving husband was entitled to all his deceased wife's personal property absolutely and all her real estate for the rest of his life. Now he usually gets an absolute or life interest in all or part of his wife's real estate and all or part of her personal estate absolutely. In Illinois, Iowa, Missouri, and Tennessee, he gets one half her real estate absolutely. In Maine he is entitled to one third of it absolutely. In Florida and Mississippi the husband gets all the property real and personal absolutely. In Massachusetts he gets real estate to the amount of $5,000 in value. If his wife leaves neither issue nor other relatives the husband generally gets the whole, and this is sometimes the case when she dies without issue or a parent surviving her.

(C) Children and other descendants

815. Subject to the rights of the surviving spouse, if the intestate leaves children, the children share equally in the real and personal estate of the decedent and take it absolutely. The issue of a deceased child represent the parent and take the share to which he or she would have been entitled.

816. Subject again to the rights of the surviving spouse, if the intestate survives his children and leaves grandchildren but no other lineal descendants, then all the grandchildren share the estate among them equally. If any grandchild has died leaving issue, these great-grandchildren take the share of their deceased parent.

(D) The father and the mother

817. Subject to the surviving spouse's rights, where there are no lineal descendants, the property of an intestate goes, in many states, to the father. In some states it goes to the father and the mother jointly or to the survivor of them. Usually, where a child who has inherited real estate from one parent dies, leaving the other parent surviving, the surviving parent cannot inherit such real estate from the child, but many states have abandoned this rule.

(E) Brothers and sisters and their descendants

818. Subject to the surviving spouse's rights, if an intestate leaves neither issue nor parent, the property generally goes to his brothers and sisters and their descendants.

(F) Other relatives

819. In default of any of the above mentioned relatives, the property of an intestate usually goes as follows: (1) To the grandparents or such of them as may survive the intestate; (2) if there is no surviving grandparent, then to uncles and aunts or their descendants; and (3) if there is no surviving representative of this class of kindred,

then to more distant collateral relatives. If the decedent dies without leaving a surviving spouse and there are no other kindred of any description, his property goes to the state. This is called *escheat*.

QUESTIONS

1. What laws govern the distribution of an intestate's realty? Of his personalty?
2. What is the general order of succession to the property of an intestate?
3. What are the rights of the widow in the estate of her husband? What are the rights of the widower in the estate of his wife?
4. If the intestate leaves no surviving spouse but children, how is his estate distributed? If the intestate leaves no children or surviving spouse, but grandchildren, how is the estate distributed?
5. When are the father and mother entitled to share in the estate of a decedent?

CHAPTER LXI

WILLS

820. The law relating to wills is extremely technical in some particulars, so that great care should be taken in drawing a will. A will is defined as a legal declaration by a man or woman designating who shall possess and enjoy his or her property or certain parts of it after his or her death.

(A) Who may make a will

821. In general, every person of full age and sound mind who is not under some legal disability may make a will. In practically all the states statutes now confer on married women the power to dispose of their property by will, subject to the husband's rights as tenant by the curtesy in his wife's estate. See Section 814. A husband may by will exclude his wife from participation in his estate except to the extent that the law entitles her to share therein. See Section 813. Either husband or wife may cut off children or other relatives entirely by will.

(B) Various kinds of wills

822. In general all wills must be in writing. A holographic or olographic will is one written entirely in the testator's own handwriting. In some states holographic wills, unlike ordinary written wills, need not be signed by subscribing witnesses, but may be proved by witnesses familiar with the testator's handwriting.

823. In all the states except Connecticut and Louisiana, one is allowed to dispose of at least a certain amount of personal property by an oral will. This is called a nuncupative will. A nuncupative will must be made during the testator's last illness in anticipation of imminent death, and must be reduced to writing within a fixed period, usually six days after the words constituting the same were spoken, and must be offered for probate with the same formality as is required in the case of a written will.

(C) Formal requisites

824. *Writing.*—Except as stated in Section 823, a will must generally be in writing. But it may be typewritten or printed.

825. *Signing.*—A will must be signed by the testator. If the testator is illiterate or physically unable to write, he may sign by making his mark. Ordinarily the signature should be at the end of the will. If the will is contained on several sheets of paper it is a wise precaution to have the testator sign each sheet of paper in addition to signing at the end of the will.

826. *Publication.*—In a few states it is required that the testator shall declare to the attesting witnesses, when they sign the instrument, that he intends it to operate as his will, and shall request them to sign it as witnesses. It is wise to observe these formalities in all the states.

827. *Acknowledgment.*—Where the testator does not actually sign the will in the presence of the witnesses, but calls them in afterwards, it is usually necessary that he shall acknowledge his signature by some formal words as, "This is my will. I have already signed it."

828. *Sealing.*—Sealing is not usually necessary unless

expressly required by statute. This requirement is made in Nevada and New Hampshire.

829. *Witnessing.*—In all the states except Pennsylvania attestation and subscription by witnesses are essential to the validity of a written will, unless the will is entirely in the testator's handwriting. See Section 822. The number of witnesses required differs in the various states. It is always well to have three competent and disinterested persons as witnesses, although in most states two witnesses are sufficient. The testator should sign the will before the witnesses, who should sign their names in the presence of the testator and of each other.

830. Persons witnessing a will should not be interested therein either as legatees, devisees, or otherwise. While the fact that a witness is interested in the will does not usually render the will invalid, it may disqualify him to take the portion which he would otherwise have received.

(D) A form of will

831. A form of will is shown on pages 417 and 418.

(E) Codicils

832. A codicil is an addition to an existing will. It does not have the effect of revoking the will already made, but either supplements it or changes it in some particulars. It should be expressly stated in the codicil that it is intended only to add to the will and not to revoke it. In general, a codicil should be executed with the same formality required in the case of wills.

(F) Revocation of wills

833. A will may be revoked in various ways as follows: (1) by some later written will or other writing executed

I, Edward Payne Brown, of the City of New York, County of Kings, and State of New York, being of sound mind, memory, and understanding, hereby revoke all former wills made by me, and make, publish, and declare the following as my last will and testament:

First, I direct that all my just debts and funeral expenses be paid as soon after my decease as may be conveniently done.

Second, I bequeath unto my brother, Arthur Brown, my library, my furniture, my watches and chains, my rings and other jewelry.

Third, I bequeath unto the Sanford Home for Indigent Widows the sum of Five Thousand Dollars ($5,000).

Fourth, I give, devise, and bequeath unto my sister, Celeste Brown, all the rest, residue, and remainder of my property, real and personal, wheresoever and whatsoever, to have and to enjoy the same during the term of her natural life.

Fifth, after the decease of my said sister, Celeste Brown, I give, devise, and bequeath one half of the property heretofore given to her for life, to her lawful issue, and the other half to my brother, Arthur Brown, absolutely and forever, or in case he should die before her then to his lawful issue him surviving. If Celeste Brown should die without issue, then the whole to Arthur Brown and his lawful issue. If Arthur Brown should die without lawful issue, the whole to the lawful issue of Celeste Brown. Or, if both Celeste Brown and Arthur Brown should die without issue, the whole to my brother, J. Parsons Brown, absolutely and forever, or in the event of his dying before Celeste and Arthur, to his lawful issue him surviving.

Sixth, should my said sister and brothers not survive me but die previously without leaving lawful issue them surviving, then I give all my said property unto the brothers and sisters of my late mother, Helen Clothier Brown, or the issue of any of them who are now or may be then deceased, absolutely and forever.

Seventh, it is my wish that no portion of my estate shall under any circumstances go to any of my relatives on my father's side. They are to be excluded entirely from any participation therein, and what I may possess at the time of my death shall go only to my brothers and sisters as aforesaid. Should none of my brothers and sisters survive me, then to my relatives on my mother's side as hereinbefore provided.

Eighth. I appoint my brother, Arthur Brown, executor of this my last will and testament.

In witness whereof, I have hereunto subscribed my name the eighth day of October, in the year of our Lord, 1919.

[*Signed*] EDWARD PAYNE BROWN (SEAL)

We, whose names are hereto subscribed, do certify that on the eighth day of October, 1919, Edward Payne Brown, the testator, subscribed his name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing, declared the same to be his last will and testament, and requested us, and each of us, to sign our names hereto as witnesses to the execution hereof, which we hereby do in the presence of the testator and of each other, on the said date, and write opposite to our names our respective places of residence.

[*Signed*] STEPHEN KENT,
Residing at New York, New York.
[*Signed*] RICHARD K. LYNCH,
Residing at New York, New York.

and proved in the same manner as a will; (2) by the burning, cancelation, or destruction of the will by the testator himself or by some one else in his presence and by his express direction; (3) by words of revocation reduced to writing, read over, and approved by the testator in his lifetime, with regard to wills of personal property in Florida, New Jersey, and Pennsylvania, and wills of personal and

real property in Maryland and Tennessee; (4) by a man's marriage and the birth of issue to him. In many states a woman's will is revoked by the mere fact of her subsequent marriage, without the birth of issue.

QUESTIONS

1. What is a will?
2. Who may make a will?
3. What is a holographic will?
4. What is a nuncupative will?
5. Give the six formal requisites of wills.
6. What is a codicil?
7. How may a will be revoked?
8. Write out a form of will for a married woman.
9. Write out a form of will for an unmarried man.

CHAPTER LXII

ESTATES IN TRUST

834. A trust is defined as a right of property held by one person for the benefit of another. The person who holds the property is called the trustee, while the person for whose benefit the property is held is called the *cestui que trust*. A trust of real property can usually be created only by means of a writing. A trust of personal property may be created by a writing or by word of mouth. The beneficiary, or *cestui que trust*, is not, strictly speaking, the owner of the trust property. The law recognizes a number of situations in which it is proper to make a provision for the benefit of certain persons, but to keep the actual legal ownership and control of the property out of them. This is done by appointing a trustee who holds the legal title, while the right to enjoy the proceeds or income from the trust property, called the equitable title, is lodged in the beneficiary. A trust may be formed during the lifetime of the one who creates it by signing and delivering a deed of trust, or by will taking effect after the creator's death.

(A) The various kinds of trusts

835. *Dry trusts.*—A dry trust exists where a trustee is given the legal title but has no active duties to perform. In many such cases no advantage is gained by depriving the beneficiary of the incidents of ownership. If A signs a deed conveying a farm to B in trust for C, and no reason appears in the deed of trust for creating a trust, the deed is not good as a trust deed, and an absolute title

passes to C. C may take charge of the property and dispose of it as he pleases, and B has nothing to do with it. C is the beneficiary and there is no apparent need for B to interfere with the property.

836. *Active trusts.*—An active trust exists where the trustee has active duties to perform, such as managing property. The purpose of the trust must not be unlawful. Such trusts are often created for the protection of the beneficiary in the expectation that the trustee chosen will be better able to manage the estate than the beneficiary himself.

837. *Spendthrift trusts.*—Spendthrift trusts are recognized in many states. This kind of trust provides that the property shall be held by the trustee without liability to execution or attachment in any suit or for any judgment against the beneficiary and not subject to any disposition by the beneficiary. The beneficiary gets merely the net income, and he is protected against the consequences of his own prodigality.

PARTRIDGE *v.* CAVENDER, 96 Mo. 452 (1888). John Cavender by will gave property in trust for his son Robert S. Cavender for life, and directed the trustees to pay the income to Robert semi-annually, "on his personal receipt therefor, without his said son having any power to sell, assign, or pledge the same previous to the payment thereof to him." Partridge rendered meritorious services to Robert S. Cavender in the preservation of the trust property and sued Robert and his trustee, Glover, in an effort to have the accrued income in Glover's hands applied to the payment of Robert's debt. *Held* that the testator's intention was that the income should be paid into the hands of his son to the exclusion of all other persons, whether claiming as assignees or creditors. Partridge could not, therefore, attach the accrued income until it had been paid to Cavender.

838. This intention to create a spendthrift trust must clearly appear. The words which are often used to denote

such intention are as follows: "Provided that the trust estate hereby created shall not be subject to any attachment or execution against any of the beneficiaries or to any assignment or contract which the beneficiaries may make by way of anticipation or otherwise. Payments are to be made directly to the beneficiaries."

839. *Married women's trusts.*—A married woman's trust is one created for the sole and separate use of a woman and free from the control of her husband. The intention is to protect the woman in the enjoyment of her separate property. Owing to the married women's property acts which generally give a married woman the same power over the property as if she were single, trusts of this character are of less importance than formerly.

840. If it appears that the woman to be benefited was neither married nor in contemplation of marriage when the trust was created, the trust fails and the woman may demand that the trustee deliver the property over to her absolutely and free from all trusts. Married women's trusts come to an end upon the death of either husband or wife.

(B) A trustee's powers, duties and liabilities

841. *To execute the trust.*—The duties and liabilities of a trustee are usually defined by the instrument creating the trust. The trustee should not depart from the terms of this instrument. He is not obliged to undertake the work and enter upon the duties of trusteeship, but once he does so he ought to carry out the terms of the trust faithfully, diligently, and with due regard to the beneficiary's best interests and the intentions of the creator of the trust.

842. *Investments.*—It is generally a trustee's duty so to invest trust funds as to obtain a reasonably high return without unduly risking the safety of the principal. Where

the trust instrument does not designate the time when investments are to be made the trustee is allowed a reasonable time in which to invest.

843. The creator of a trust may indicate certain securities as proper investments for trust funds, or he may expressly prohibit the trustee from making certain kinds of investments. Generally, state statutes designate certain forms of investment for fiduciaries. Government and municipal bonds and first mortgages upon improved real estate are usually safe investments for trust funds. A trustee is personally liable for losses resulting from his negligence or want of good faith. While he is not an insurer of the safety of funds placed in his hands, he is held to the exercise of a reasonable degree of sound business judgment.

844. *Compensation.*—A trustee is usually entitled to a fair compensation for the faithful performance of his duties. His remuneration may be fixed by the trust instrument, or may by some local rule of law be based upon a percentage of the trust funds, both principal and interest, coming into his hands. Extra compensation may be allowed him when he has performed services other than those usually required in the administration of trust property.

845. *Accounting.*—A trustee should keep an accurate record of moneys handled by him, showing in detail all receipts and expenditures. The beneficiaries of the trust are entitled to have the accounts of the trustee rendered to them periodically. Sometimes the trust instrument or a local statute regulates the filing of the trustee's accounts.

846. The management of a trust estate may continue for years, and carelessness in any degree may result in heavy loss. The trustee should take receipts for all payments to beneficiaries and should not usually allow them to anticipate their income. If he does allow this, trouble may follow, because a life tenant's income ceases when he dies. If the trustee has permitted the life tenant to anticipate his

income the trustee will lose, for he cannot charge the remainderman with moneys advanced to the life-tenant.

847. It is the duty of a trustee to exhibit his books and accounts at reasonable times to those who have the right to inspect them. Where there are a number of beneficiaries each of whom is entitled to income, the trustee should not favor one at another's expense. His accounts should show how each stands as respects distribution of income and principal. He should also keep matters of distribution apart from matters of administration, the income account apart from the principal account, and the personalty apart from the realty account.

QUESTIONS

1. Define trust, trustee, *cestui que trust.*
2. How are trusts of real and of personal property created?
3. Define dry trust, active trust, spendthrift trust.
4. What words are generally used to create a spendthrift trust?
5. What is a married woman's trust?
6. Discuss the subject of the investment of trust funds.
7. In your state what kinds of securities are legal investments for trust funds?
8. What are a trustee's duties as respects accounting?

INDEX

(*The references are to sections.*)

Acceptance. See BILLS OF EXCHANGE.
Acceptor, 205.
Accommodation party, married woman as, 99.
to negotiable instruments, 181.
Accounting, by executors and administrators, 798–809.
by partners, 381–384.
by trustees, 845.
by trustees in bankruptcy, 299.
Acknowledgment, to deed, 671, 683.
to quit-claim deed, 677.
to real estate sale contracts, 666.
Administrators. See EXECUTORS AND ——.
Advances, 846.
Advertisement, as an offer, 32, 33.
by executors and administrators, 784.
of application for charter, 408.
Affirmance, by insane person, 93.
by minor, 89–90.
Agency, bankruptcy, effect of, 358.
by agreement, 313–314.
by estoppel, 318.
by partners, 315, 374–378.
by ratification, 320.
death, effect of, 356.
definition of, 308–309.
Agency, formation of relation, 308–320.
implied, 315–317.
obligations of agent, 321–331.
obligations of principal, 332–341.
obligations of third parties, 342–347.
sub-agency, 311.
termination of, 348–358.
to make surety contracts, 702.
Agreement, discharge of contract by, 255–257.
formation of agency by, 313–314.
of merger, 488.
termination of agency by, 349.
termination of partnership by, 389–390.
termination of corporation by, 516–518.
Alteration, 250.
Arbitrators, settlement of dispute by, 270.
Assessment, by whom made, 471.
liability of stockholder for, 462–465.
Assignment, by operation of law. See TRANSFER.
dissolution of partnership by, 397.
for benefit of creditors, 397.
of claims for wages, 170.

Baggage, carriers, duty towards, 598.
what is, 599.
Bailee, compensation of, 564.
lien of bailee, 565–566.
obligations of bailee, 558–563.
outlawry of obligation of, 562.
rights of, 564–566, 569.
Bailment, 550–569. See Bailor and Bailee.
Bailor, obligations of, 564–567.
rights of, 558–562, 568.
Bankruptcy, discharge of contract by, 276–307.
termination of agency by, 358.
termination of corporation by, 522–526.
termination of partnership by, 397.
Bids, 34–36.
Bills of exchange, acceptance of, 232–236.
dishonor of, 221–230.
form of, 183, 232.
foreign, 231.
inland, 231.
presentment of, 211–220.
protest of, 236–238.
what are, 183–184.
Bills of lading, 241, 580.
Bonds, 239–240.
Breach, discharge of contract by, 262–272.
termination of agency by, 351–355.
termination of corporations by, 520.
termination of partnership by, 392–393.
Bucket shops, 135.
Building associations, 137.
By-laws of corporations, 410.
Capacity to contract, 78–104. See Minors, Insane Persons, Married Women, Corporations, Foreigners.
Caveat emptor, 630.
Certificate, of incorporation, 404.
of merger and consolidation, 488.
of partnership, 400.
of stock, 428–433.
Cestui que trust, 834.
Charity, subscriptions to, 74.
Charter of corporation, 404–409.
Chattel mortgage, breach of conditions of, 645.
definition of, 641.
equity of redemption, 646.
form, 646.
validity of, 642, 644.
Check, 184.
Common carriers, as insurers, 581
baggage, 598–599.
compensation of, 587–589.
connecting carriers, 578–579.
definition of, 571.
delivery by, 591–597.
delivery to, 576–577.
discrimination by, 575.
distinguished from private, 571.
duty to receive, 574–575.
facilities of, 575.
sale of goods by, 590.
who is, 571–573.
Compensation, of executors, 807.
of trustees, 844.
Competition, 140.
Composition, 289.
as consideration, 73.
confirmation of, 289–290.
Compromise, as consideration, 69.
of criminal actions, 139.
Concealment, in fire insurance, 733.

Concealment, in life insurance, 760.
Condition subsequent, 257.
Connecting carriers, 578–579.
Consent, reality of, 105–125. See MISTAKE, MISREPRESENTATION, FRAUD, UNDUE INFLUENCE, and FORCE.
Consideration, adequacy of, 68.
compromise as, 69.
definition of, 59.
for suretyship contract, 697.
moral obligation as, 75–76.
mutual promises as, 72–74.
performance of legal obligation as, 70–71.
present, past, or future, 75–76.
presumed in negotiable instruments, 180.
what constitutes, 64–65.
Contract, assignment of. See TRANSFER.
breach of, 262–272.
capacity of parties to, 78–104.
consideration of, 58–77.
definition of, 15–19.
definiteness necessary to, 37–41.
discharge of, 255–307.
elements, 24.
entire and severable, 265.
formality necessary to, 148–159.
implied, 44–46.
intention to enter into, 30–36.
interpretation of, 251–254.
legality of object, 126–147.
negotiability of, 177–244.
offer and acceptance, 57.
of partnership, 361.
of sale, 600–606.
operation of, 160–244.
reality of consent, 105–125.
seal, 58–61, 670.
special formality, 148–159.
Contract, terms of, 42–43.
Corporations, assignment by, 462–465.
bankruptcy of, 522–526.
by-laws of, 410.
certificate of stock in, 428–433.
classes of, 504–514.
consolidation and merger, 485–492.
dealings of directors with, 478.
definition of, 404.
directors of, 468–479.
dividends of, 436–443.
elections of, 445–450.
foreign, 500–503.
formation of, 404–409.
fraudulent issue of stock, 435.
indebtedness of, 466–467.
kinds of, 504–514.
membership in, 425–434.
meetings of, 445–456.
minority rights in, 458.
municipal, 509–512.
officers of, 468–484.
powers of, 411–414.
promoters of, 420–423.
quasi, 505–508.
receiverships for, 523–526.
reports of, 499.
semi-public, 513–514.
stockholders in, 436–458.
taxation of, 493–498.
termination of, 515–526.
transfer of interest in, 431–432.
voting in, 445–456.
voting trusts, 434.
ultra vires acts, 415–419.
Creditors, in bankruptcy, 300–305.
of firm, 385–387.
preferred, 302–303.
Crimes, by agent, 339.

Damages, for breach of contract, 267–271.
liquidated, 268–269.
Death, discharge of contract by, 274.
of partner, 394.
removal of executor by, 776.
termination of agency by, 356.
Debts, in bankruptcy, 293.
of corporation, 466–467.
of decedent, 806.
priority of, 791.
Decedents' estates, adjudication, 808.
collection of assets of, 787–790.
distribution of, 809.
duties of executors and administrators, 782–809.
who entitled to administer, 773–774.
widow's exemption, 810. See Executors, Administrators.
Deed, covenants in, 678–683.
delivery of, 672.
execution of, 668–672.
forms, 678, 683.
recording of, 674.
Directors, compensation of, 476.
dealings with corporation by, 478.
first meeting of, 409.
liabilities of, 477–479.
powers of, 471–475.
qualifications of, 468–470.
Disaffirmance, 83.
Discharge of contract, by agreement, 255–257.
by bankruptcy, 276–307.
by breach, 262–272.
by condition subsequent, 257.
by impossibility, 273–275.
by novation, 70, 71, 256.
Discharge, by performance, 258–260.
by release, 256.
Discrimination, 575.
Distraint, 654.
Dividends, by whom declared, 436–437.
claimants of, 442–443.
in bankrupt estates, 305.
on corporation stock, 439–441.
priority in payment of, 439–440.
Drafts, 184.
Drawer, 204.
Drunkenness, 94.
Duress. See Force.

Election of corporate officers, 409.
Escheat, 819.
Estoppel, agency by, 318–319.
partnership by, 362.
Evidence, relating to contracts, 245–250.
Execution for crime, 766.
Executors and administrators, accounts of, 798–807.
appointment, 773.
bonds, 780.
compensation of, 807.
discharge of, 809.
duties of, 782–809.
inventory and appraisement by, 785–786.
investment by, 790.
kinds of administrators, 775–779.
notice of appointment of, 784.
of deceased partner, 395, 396 788.
payment of debts by, 806.
payment of taxes by, 794–797.
powers over realty, 789.
proof of authority of, 770.

Executors, proof of will by, 771–772.
qualification by, 773–774.
removal of, 781.
sale of property by, 789.
Exemptions, of bankrupts, 287.
widows, 810.

Fellow servant, 336.
Fire insurance, avoiding policy, 737–741.
formation of contract, 732–736.
insurable interest, who has, 726–731.
proof of loss, 748–752.
risks covered by, 742–744.
transfer of policy by, 745–747.
who may write, 79.
Fixtures, 664.
Force, 124–125.
Foreign corporations, doing business by, 502.
penalties, 503.
power of state to exclude, 501.
what are, 500.
Foreigners, 100–103.
Forms, acceptance of draft, 232.
chattel mortgage, 646.
collateral security note, 193.
contract under seal, 58.
corporation by-laws, 410.
deed, 678, 683.
draft, 183.
indorsements, 196.
lease, 651.
negotiable coupon bond, 240.
option contract, 72.
power of attorney, 315, 431, 434.
promissory note, 180.
proxy, 450.
quit-claim deed, 677.
stock certificate, 430.
Forms, warranty deed, 683.
will, 831.
Fraud, 115–119.
concealment as, 117.
deceit as, 115–116.
effect on contract, 115.
in sales, 614, 617–621.
in stock issue, 435.
Frauds, statute of. See SPECIAL FORMALITY.

Gambling debts, 133–135.
Guaranty. See SURETYSHIP AND ——.
Guardian, 85, 92.

Holder in due course, 182.

Impossibility, discharge of contracts by, 273–275.
termination of agency by, 356–357.
termination of corporations by, 521.
termination of partnership by, 394–396.
Indorsements, 195–198.
Infants. See MINORS.
Insane persons, as partners, 394.
contractual powers of, 92–95.
liability for necessaries, 92.
Insolvency, of a partner, 397.
termination of corporations by, 522.
termination of partnership by, 397.
Insurance, 725–768. See FIRE INSURANCE and LIFE INSURANCE.
Interest, in partnership dealings, 366.
legal rate of, 136.

Intestate law, brothers and sisters, 818.
escheat, 819.
father and mother, 817.
issue, 815–816.
law governing, 811.
next of kin, 819.
widow or widower, 812–814.
Inventory and appraisal, 785–786.

Joint stock companies, 401–403.

Landlord and tenant, formation of relation, 647–652.
landlord's rights, 653–657.
tenant's rights, 658–664.
Leases, formality required, 651.
implied, 649.
verbal, 650.
written, 651.
Legal investments, 842–843.
Legality, 126–147.
Lien, for purchase money, 622–624.
of bailee, 565–566.
of carrier, 588.
Life insurance, avoiding policy of, 760–762.
beneficiaries, 763–765.
insurable interest, who has, 754–758.
premiums, 753.
suicide, effect of, 766–767.
Life tenant, 846.
Limitations, Statute of, 272.

Maker of negotiable instrument, 203.
Marriage, contracts improperly affecting, 144.
of minor, 87.
Married women, agent of husband, 317.
as surety, 698.
contractual powers of, 96–99.
Merger of corporations, 485–492.
Minors, affirmance of contracts by, 89.
contractual powers of, 82–91.
disaffirmance of contract by, 83.
torts of, 91.
who is a minor, 86.
Misrepresentation, 112–114.
Mistake, 108–111.
Mortgage, 686–692.

Necessaries, for insane persons, 92.
for minors, 82–86.
for wife, 317.
what are, 85.
Negligence, 335–336.
Negotiable contracts, 177–244.
Negotiable instruments, accommodation party, 181.
alteration of, 250.
bills of exchange, 180–238.
bills of lading, 239–241.
checks, 184.
consideration, 180.
date of, 188.
dishonor, notice of, 221–230.
indorsement of, 194–202.
parties to, 203–206.
presentment, 211–220.
promissory notes, 180–231.
protest of, 235–238.
requirements of, 185–193.
rights of indorsee, 199.
stocks and bonds as, 239–244.
warehouse receipts as, 239.
when negotiated, 194.
Next of kin, 819.

Novation, 70, 71, 256.
Nuncupative wills, 823.

Offer and acceptance, 25–57.
Outlawry of debts, 272.

Partners, as agents of the firm, 374–378.
compensation of, 380.
in bankruptcy, 284–286, 397.
interest of, 369–373.
kinds of, 362.
liability of, 385.
special, 398–400.
Partnership, accounts of, 381–384.
admission of members to, 371.
contract of, 361.
debts of, 385–387.
definition of, 360.
implied, 361.
notice of dissolution, 390.
property of, 369–373.
termination of, 388–397.
test of, 363–367.
Partnerships, limited, 398–400.
joint stock companies, 401–403.
liability of members, 399, 403.
Performance, discharge of contract by, 258–261.
discharge of agency by, 350.
termination of corporation by, 519.
termination of partnership by, 391.
Personal property, acquisition of, 530–536.
bailment of, 550–569.
definition of, 527.
lost, 533.
mortgage of, 641–646.
rights of purchaser in, 629–640.
rights of seller in, 616–628.
Personal property, sales of, 600–640.
transportation of, 570–599.
Pledge, as security, 432.
right to income of, 443.
Power, coupled with interest, 352–353.
of attorney, 314.
Premiums, failure to pay, 762.
Profits, in lieu of interest, 366.
in lieu of rent, 365.
Promissory notes. See Negotiable Instruments.
Promoters, 420–423.
Protest, 237–238.
Proxy, 450.

Quit claim deeds, 676–677.
Quorum, 453.
Quotation of prices, 32.

Ratification of contract, 89.
Real estate, contracts regarding, 150–152, 666–667.
law governing, 810.
leases of, 647–652.
mortgage of, 686–692.
of decedent, 789.
of partnership, 369–373.
sales of, 665–685.
Receiver, 523.
Recording, effect of, 674.
of certificate of partnership, 400
of charter, 408.
of chattel mortgage, 643.
of contract of sale, 666.
of deed, 674.
of leases, 651.
Referees, 296–297.
Release, discharge of contract by 256.
of stockholder's liability, 464

Release, under seal, 256.
Rent, 653.
Renunciation, 771.
Repairs, 662–663.
Restraint of trade, 140–143.
Rewards, 47.

Sales, by sample, 639.
  contract of, 603–605, 665–667.
  distinguished from bailment, 606.
  fraudulent, 614–615, 617–621.
  in bulk, 621.
  seller's lien, 622.
  seller's right to avoid, 617–620, 631–632.
  stoppage in transit, 625–628.
  warranty by seller, 633–639.
Seal, surety contract under, 697.
  what constitutes, 58–61, 670.
Sheriff's sale, no warranty of title, 640.
Signature, to negotiable instrument, 185.
  to lease, 651.
  to will, 825.
Special formality, 148–159.
  contracts to be performed a year after their making, 155.
  miscellaneous contracts, 159.
  realty contracts, 150–152.
  sales of personalty, 153–154.
  surety contracts, 156–158, 701.
Special partnership, joint stock companies, 401–403.
  limited partnerships, 398–400.
Spendthrift trusts, 837–838.
Stock, fraudulent issue of, 435.
  negotiability of, 239–240, 431, 432.
Stockholders, liability of, 459–466.
  meetings of, 445–456.
Stockholders, preferred, 439–441.
  release of, 464.
  right of control, 458.
  right to dividend, 436–438.
  right to inspect books, 457–458.
  right to subscribe for stock, 444.
  right to vote on merger, 487.
  right to vote on stock, 445–450.
Stoppage in transit, 625–628.
Subrogation, 716.
Subscriptions, liability for, 459–461.
  to charities, 74.
  to stock, 459.
Sub tenant, 656.
Suicide, 766.
Sunday agreements, 131, 132.
Suretyship and guaranty, authority of agents and partners, 702–703.
  distinction between, 695.
  formality required, 156–157, 701.
  formation of contract, 696–703.
  joint sureties, 715.
  nature of undertaking, 693–695.
  obligations of creditor, 704–711.
  obligations of principal, 716.
  obligations of surety, 712–715.
  termination of, 717–724.

Taxation, of corporation, 493–498.
  of decedents' estates, 794–797.
Tender, 259–260.
Time, element of contracts, 266–267.
  extension of, 721.
Title insurance, 667.
Torts, of agent, 338.
  of minor, 91.
  of partner, 378.
Transfer, by operation of law, 171–173.

Transfer, by subsequent agreement, 164–170.
of negotiable contractual rights, 177–244.
of non-negotiable contractual rights, 174–176.
Trusts, defined, 834–840.
formality of creation of, 834.
kinds, 835–840.
Trustee, accounts of, 845–847.
compensation of, 844.
in bankruptcy, 298–299.
investment of funds by, 842–843.

Undisclosed principal, 343–344.
Undue influence, 120–123.
Usury, 136–137.

Voting, cumulative, 446.
by fiduciaries, 448.
by proxy, 450.

Wages, assignment of, 170.
preference given, 791.
Warehouse receipts, negotiability of, 239.
Warranty, in deed, 678–683.
in insurance contract, 736, 760.
in sales of personalty, 633–640.
implied, 636, 640.
of quality, 634.
of title, 640.
Wills, form of, 828.
nuncupative, 823.
olographic, 824.
of minor, 821.
proof of, 771–772.
revocation of, 833.
signature to, 825.
witnesses to, 829–830.
Writing, advantages of, 246–249.
required in contracts to be performed a year after making, 155.
required in miscellaneous contracts, 159.
required in realty contracts, 150–152.
required in sales of personalty, 153–154.
required in suretyship and guaranty contracts, 156-158.

THE END